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Human rights and international solidarity

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Independent Expert on human rights and international solidarity Obiora Chinedu Okafor, submitted in accordance with Human Rights Council resolution 35/3.

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Report of the Independent Expert on human rights and international solidarity

Summary

This is the second report prepared by the Independent Expert on human rights and international solidarity, Obiora Chinedu Okafor, and the first addressed to the General Assembly. In the present report, submitted pursuant to Human Rights Council resolution 35/3, the Independent Expert engages with important issues and problems arising in the context of global migration in connection with the enjoyment, or lack thereof, of human rights-based international solidarity.

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I. Introduction

1. In his first report (A/HRC/38/40), presented to the Human Rights Council in June 2018, pursuant to its resolution 35/3, the Independent Expert on human rights and international solidarity, Obiora Chinedu Okafor, summarized the work undertaken by his predecessors, outlined his activities since his appointment, set out his objectives and his workplan and discussed his thematic priorities. He also seized that opportunity to express his deep gratitude to his predecessors for the extensive work that they had undertaken since the establishment of the mandate in 2005, noting that his vision for the mandate flowed from, and built upon, the commendable work done by those previous mandate holders.

2. In the present report, the Independent Expert engages with important issues and problems arising in connection with one of the thematic priorities that he has established for his mandate, i.e., the enjoyment, or lack thereof, of human rights-based international solidarity in the context of global migration. This is in line with the promise he made in his first report, to study and report on issues that lie at the intersection of international solidarity with our current (albeit histo..cally enduring) human migration challenge. An important goal in this regard is to increase our understanding of, and better illuminate, the role of human rights-based international solidarity in addressing some of the key global migration-related concerns and issues of our time. A corresponding and complementary objective is to augment our appreciation and awareness of the role of the absence, or insufficiency, of human rights-based international solidarity in exacerbating our global migration-related challenges. To that end, the specific issues and problems that are discussed and analysed in the present report are: positive expressions of human rights-based international solidarity in the global migration context (good practices); key human rights-based international solidarity gaps in the global migration context (areas to be improved); and the abusive deployment of international solidarity in the global migration context. The related topic of the suppression or criminalization of individuals and groups who show solidarity to migrants will be discussed in a separate report, to be presented to the Human Rights Council in June 2019.

3. Given that the world is currently in a moment of heightened ferment in terms of the global migration situation, and in the light of the ongoing negotiations on the adoption of the Global Compact for Safe, Orderly and Regular Migration,[1] the Independent Expert considered it timely and important to focus in the present report on the issues identified above. It is hoped that the analysis, conclusions and recommendations offered here will be taken into consideration in the implementation of both the Compact and the already existing relevant international law treaties and instruments.

4. The report is divided into seven sections. This first section introduces the report. In section II, a brief background on human rights-based international solidarity in the global migration context is provided. Section III is devoted to a discussion and analysis of the positive expressions of human rights-based international solidarity in the global migration context. In section IV, key human rights-based international solidarity gaps in the global migration context are identified and analysed. Section V focuses on the abusive deployment of international solidarity in the current global migration context. Section VI provides brief concluding remarks and some recommendations for human rights-based reform of the global migration regime.

5. It should, however, be noted at the outset that the present report does not deal with the topic of global migration in and of itself. Rather, it deals with issues that lie

[1] See International Organization for Migration (IOM), "Global compact for safe, orderly and regular migration", 11 July 2018. Available at www.iom.int/global-compact-migration.

at the intersection of human rights-based solidarity and global migration. Even so, given the vastness of the topic, the report does not consider every issue or problem that falls within this scope.

II. A brief background on human rights-based international solidarity in the context of global migration

6. The Independent Expert envisions international solidarity, as defined in the draft declaration on the right to international solidarity (A/HRC/35/35, annex 1), as the expression of a spirit of unity among individuals, peoples, States and international organizations and other stakeholders, encompassing the union of interests, purposes and actions and the recognition of different needs and rights to achieve common goals. This expression thus refers to both solidarity between and among States and solidarity across borders between and among communities, groups and individuals.

7. The Independent Expert considers that international solidarity is a foundational principle underpinning contemporary international law and is based on respect for and the protection and fulfilment of human rights and fundamental freedoms for all individuals, without distinction or discrimination. As recognized in Article 1 of the Charter of the United Nations and article 28 of the Universal Declaration of Human Rights, such solidarity is necessary to developing a comprehensive response to global challenges such as migration in a manner that is consistent with the human rights obligations of States.

8. In acting in international solidarity to address the challenge posed by migration, the Independent Expert recalls that States must remain cognizant of the human rights of migrants. These rights are grounded in international human rights treaties, including the International Covenant on Civil and Political Rights, the International Covenant on Economic and Social Rights and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Most of the rights contained in the International Covenant on Civil and Political Rights and the International Covenant on Economic and Social Rights are applicable to all individuals, regardless of their migration status.[2] In the context of migration, these rights guarantee certain protections, including the requirement that migration detention be used only as a measure of last resort (see A/HRC/20/24), and individualized and fair consideration of their cases (see A/HRC/38/41, para. 35). In addition, there are certain rights guaranteed specifically to migrants in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, such as the rights to enjoy treatment that is no less favourable than that which applies to nationals of their host State in terms of remuneration and other conditions of work/employment and to social security.

III. Positive expressions of human rights-based international solidarity in the context of global migration

A. Civil society practices

9. Some of the most important positive expressions of human rights-based international solidarity in the global migration context can be observed in the customary practices of certain progressive civil society groups around the world. These practices mostly take the following forms: the patrolling of large bodies of

[2] See general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant, para. 10.

water by vessels belonging to humanitarian and other groups to rescue irregular migrants at risk of death by drowning; the facilitation of the entry into a given country of irregular migrants; the transportation of such migrants either into or within a country; the granting of sanctuary in churches to such migrants; the organization of mass rallies, protests and "national days of solidarity" in support of such migrants; protests on board aircrafts directed at the perceived ill-treatment of persons being deported by air; speaking out in the media in favour of irregular migrants; the provision of basic necessities of life, such as food, water and shelter, to such migrants — including those facing a serious risk of death in inhospitable border areas; and the provision of medical or legal assistance to such migrants.[3] It should be noted that this is not, of course, an exhaustive list of the civil society practices that fall into the category of positive expressions of human rights-based solidarity in the global migration context.

10. A few examples of some of these civil society practices in solidarity with (irregular) migrants will suffice to flesh out the overall point that is being made in this section. National rallies/protests in 2009 in one European State resulted in the rejection of a bill that had proposed the deportation of 28,000 irregular migrants and the arrests of 5,500 people aiding them in that year.[4] Similarly, in November 2013, the "Let's save hospitality" campaign was instrumental in the withdrawal of a proposed law in one European country to amend article 318 bis of its Penal Code "by broadening the scope of the anti-trafficking and smuggling provisions to potentially include solidarity and humanitarian aid in broad terms at the discretion of the prosecutor".[5] Another important instance of a positive civil society practice in the current context is that Pope Francis is among the many faith leaders who have repeatedly appealed to believers to shelter migrants/refugees. The Pope has called upon every parish, religious community, monastery and sanctuary to take in one migrant/refugee family.[6] In another country, one of its local farmers is now internationally renowned for providing shelter to homeless migrants.[7] In the same country, a number of groups provide food and shelter to migrants.[8] Finally, ADM, a group of volunteers operating in a border area in Southern Europe, prepares

[3] See Shalini Bhargava Ray, "Saving lives", *Boston College Law Review*, vol. 58, No. 4 (2017); Liz Fekete, "Europe: crimes of solidarity", *Race and Class*, vol. 50, No. 4 (2009); Andrew Burridge, "Differential criminalization under Operation Streamline: challenges to freedom of movement and humanitarian aid provision in the Mexico-US borderlands", *Refuge*, vol. 26, No. 2 (2009); Valentina Della Fina, *Cap Anamur* Case (2011), Yearbook of International Humanitarian Law, vol. 13, (2010), pp.5 42–546; Tugba Basaran, "Saving lives at sea: security, law and adverse effects", *European Journal of Migration and Law*, vol. 16 (2014); and Maria Lorena Cook, "'Humanitarian aid is never a crime': humanitarianism and illegality in migrant advocacy", *Law and Society Review*, vol. 45, No. 3 (2011).

[4] See Jennifer Allsopp, "Contesting *fraternité*: vulnerable migrants and the politics of protection in contemporary France", Working Paper Series No. 82 (Refugee Studies Centre, University of Oxford, 2012).

[5] See Mark Provera, *The Criminalization of Irregular Migration in the European Union*, Centre for European Policy Studies Paper in Liberty and Security in Europe, No. 80 (Brussels, Centre for European Policy Studies, 2015).

[6] See Anthony Faiola and Michael Birnbaum, "Pope calls on Europe's Catholics to take in refugees", *Washington Post*, 6 September 2015. Available at www.washingtonpost.com/world/refugees-keep-streaming-into-europe-as-crisis-continues-unabated/2015/09/06/8a330572-5345-11e5-b225-90edbd49f362_story.html?utm_term=.6fea80f4b042.

[7] "French farmer Cedric Herrou fined for helping migrants", BBC News Europe, 10 February 2017. Available at www.bbc.com/news/world-europe-38930619.

[8] See Kyle G. Brown, "France prosecuting citizens for 'crimes of solidarity'", Aljazeera France, 25 January 2017. Available at www.aljazeera.com/indepth/features/2017/01/france-prosecuting-citizens-crimes-solidarity-170122064151841.html.

approximately 6,000 meals per day for migrants and refugees and supports detained migrants in the area close to the border.[9]

11. The reason that the Independent Expert sees these kinds of civil society practices as positive expressions of human rights-based international solidarity in the global migration context is principally because it is a well-established fact that, like all other human beings, migrants are entitled to enjoy almost all internationally guaranteed and normatively universal human rights. For the most part, these human rights are not rendered inoperative or suspended because migrants either seek to enter another country or have already crossed into it. As discussed above, international solidarity is not limited to the acts of States but is also manifested by individuals, communities and groups acting according to the Universal Declaration of Human Rights, which calls upon everyone to act towards one another with a spirit of brotherhood and humanity. From the perspective of international human rights law, it is an act that promotes human rights, and therefore a positive practice, for a civil society actor to facilitate the enjoyment of such rights by irregular migrants.

B. The laws and practices of cities and other local governments

12. Many local and regional governments around the world, especially cities, have developed a range of strategies (formal and informal) for dealing with the direct consequences of the anti-immigrant laws, policies and practices that have issued from their central governments.[10] In some instances, these levels of government have even had to navigate around or counter central government policies or measures.[11] Thus, many cities have been leading the charge for more open and fairer immigration laws, policies and practices, and have been doing so through the adoption of tactics ranging from protest, through outright defiance of national immigration initiatives, to the proactive institution of legislation, policies and practices on the integration of migrants.[12] Such efforts by cities are gaining momentum.[13] It is in these ways that many cities have expressed their human rights-based international solidarity with (irregular) migrants.

13. For example, in one European country, five centre-left party-governed federal entities have refused to deport back to Afghanistan migrants whose asylum claims have been denied, and have adopted this stance in direct opposition to the orders of that country's Interior Ministry.[14] These five entities argue that Afghanistan does not have "secure provinces," and have deployed their legal right to issue a temporary moratorium on deportations to block some of the central Government's deportation activities.[15] Under the slogan "the right to a city," another city in the country concerned has demanded equal living conditions for all people living in the city, regardless of their nationality or their immigration/residence status.[16] Similar pro-migrant approaches in direct contrast (in some cases) with the policies of their

[9] See World Organisation against Torture and Observatory for the Protection of Human Rights Defenders, "Greece: ongoing crackdown on civil society providing humanitarian assistance to migrants and asylum seekers". Available at www.omct.org/human-rights-defenders/urgent-interventions/greece/2016/04/d23733/#_ftn4.

[10] See Harald Bauder, "Sanctuary cities: policies and practices in international perspective", *International Migration*, vol. 55, No. 2, April 2017.

[11] See Provera, *The Criminalization of Irregular Migration in the European Union*.

[12] See Jessica Bither and Paul Castello, "Cities across the Atlantic raise their voices for migrants and refugees", 28 February 2017. Available at www.gmfus.org/blog/2017/02/28/cities-across-atlantic-raise-their-voices-migrants-and-refugees.

[13] Ibid.

[14] Ibid.

[15] Ibid.

[16] See www.frankfurter-info.org/termine/sanctuary-city-solidarity-city.

national Governments have been adopted by other cities in Europe.[17] The then mayor of a major city appealed to the public in a Facebook post in 2015 to help migrants and refugees.[18] "Europe, Europeans: open your eyes," she wrote, "either we deal with a human drama using the capacity to love that makes us human, or we will end up dehumanized."[19] Following this, the mayor of another city pledged to join a network of sanctuary cities and set aside an 11 million euro fund for migrant/refugee aid.[20] A small northern town of 20,000 inhabitants in Western Europe has welcomed migrants who are en route to the United Kingdom of Great Britain and Northern Ireland, notably by constructing a reception centre with Médecins sans frontières so as to afford decent living conditions to the migrants concerned.[21] Another major European municipality has contested national policy against migrants, and has also provided medical assistance, information as to their legal rights and accommodation to rejected asylum seekers (deemed to be migrants).[22]

14. In one North American country, certain municipalities have adopted a similar posture and have become widely known as "sanctuary cities."[23] Such cities "have laws, policies or practices" that "limit cooperation with immigration enforcement agents in order to protect low-priority immigrants from deportation, while still turning over those who have committed serious crimes."[24] These sanctuary cities tend to be made possible by the fact that federal officials in that country must rely on local police to help enforce federal immigration laws, but the law does not require local authorities to detain irregular immigrants just because their federal counterparts make such a request.[25]

15. As several authors have correctly noted, sanctuary cities in that North American country tend to base their non-cooperation, in some cases, with the national immigration authorities on the basis of the following main arguments:

(a) That being an irregular migrant is not a crime. It is a civil violation in that country;[26]

(b) That holding immigrants past the point when they should be released in order to ensure that the federal immigration authorities are able to arrest them is unconstitutional: immigrants can sue the police for unlawful holding;[27]

(c) That nothing in national law requires localities to enforce the national immigration legislation.[28]

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[17] See Provera, *The Criminalization of Irregular Migration in the European Union*.

[18] See Ian Mount, "In Spain, and all of Europe, cities open doors to refugees", *Fortune*, 8 September 2015. Available at http://fortune.com/2015/09/08/europe-refugee-crisis-spain/.

[19] Ibid.

[20] Ibid.

[21] See Médecins sans Frontières, "France: frequently asked questions about MSF's work in Grande Synthe camp", 29 January 2016. Available at www.msf.org/en/article/france-frequently-asked-questions-about-msfs-work-grande-synthe-camp.

[22] See Provera, *The Criminalization of Irregular Migration in the European Union*.

[23] See Van Le, "Immigration 101: what is a sanctuary city?", America's Voice, 25 April 2017. Available at https://americasvoice.org/blog/what-is-a-sanctuary-city/.

[24] Ibid.

[25] See Darla Cameron, "How sanctuary cities work, and how Trump's blocked executive order could have affected them", *Washington Post*, 18 January 2017. Available at www.washingtonpost.com/graphics/national/sanctuary-cities/.

[26] Ibid.

[27] Ibid.

[28] See Immigrant Legal Resource Center and Washington Defender Association, FAQ on 8 USC § 1373 and federal funding threats to "sanctuary cities". Available at www.ilrc.org/sites/default/files/resources/8_usc_1373_and_federal_funding_threats_to_sanctuary_cities.pdf.

16. On the other hand, opponents of sanctuary cities in that country have argued that "immigration is a federal responsibility ... [and] you cannot have 3,000 different policies, it is chaos."[29] Whatever the correctness of these counter-arguments, they neither address nor detract from the accuracy of the arguments made by the sanctuary cities as outlined above.

17. Several cities in Africa, Latin America, the Middle East and Asia have similarly adopted laws, policies and practices aimed at demonstrating solidarity with and effectively integrating migrants. For example, one major Latin American city has emphasized "open and inclusive migration governance" and has pushed the national Government to increase financial support to localities for the purpose of welcoming migrants.[30] In one major Asian country, cities have engaged in a competition to attract diverse and highly skilled migrants, helping to spur a more coordinated national policy.[31] In one State in the Middle East that is a significant destination country for a large number of migrants, a number of cities have created a position of Chief Resilience Officer, designed to coordinate the response to rising numbers of migrants and refugees across city government in order to ensure the effective use of resources and proper provision of guaranteed public services.[32] In one African State that is an important destination State within its region, localities have partnered with United Nations agencies, the World Bank, the national Government, civil society and migrants themselves in order to create a self-reliance and resilience strategic framework in which migrants are included as "active agents of governance and development".[33]

18. Cities around the world have also come together in solidarity with one another to support joint efforts to demonstrate solidarity to migrants, for example through the Global Parliament of Mayors, which, in its "migration sessions" in 2016 examined the questions of what cities mean in the context of global migration, what cities can achieve together with the experience of migrants, and what has already been done by cities to welcome and integrate migrants.[34]

19. The overall point here is that many cities around the world have, in a range of ways and through a variety of means, expressed human rights-based international solidarity with (irregular) migrants around the world. By, among other things, expressing support for migrants, welcoming them to their territories, extending medical and other services to them, and shielding them from harsh national detention and deportation practices, these cities have helped to meet the human rights obligations of their States and have acted in accordance with the spirit and letter of the draft declaration on the right to international solidarity.

[29] See Cameron, "How sanctuary cities work, and how Trump's blocked executive order could have affected them".

[30] United Nations, "Migrants and cities: a public administration perspective on local governance and service delivery", 5 September 2017. Available at www.un.org/en/development/desa/population/events/pdf/expert/27/papers/VI/paper-Blind-final.pdf.

[31] Ibid., p. 6.

[32] Ibid., p. 7.

[33] Ibid., pp. 8–9.

[34] Global Parliament of Mayors, "'Cities of arrival': migrants and refugees", 10 September 2016. Available at https://globalparliamentofmayors.org/wp-content/uploads/2017/01/Position-Paper-Cities-of-Arrival.pdf.

C. Country-level laws and practices

Taking in migrants as an act of international solidarity

20. An important positive expression of human rights-based international solidarity in the global migration context is the fact that many countries around the world have taken in large numbers of migrants, and many have taken in a disproportionate percentage of that number, relative to the sizes of their own populations and the availability of resources. This is an important indication of human rights-based international solidarity in the global migration context, as nothing could be more indicative of a sense of or desire for oneness with foreigners than their acceptance into another country.

21. In the case of the African continent, while the most significant growth over the last two decades or so in the migration of Africans has occurred in terms of their movement from Africa to other continents, an even greater number of Africans have migrated to another African country during the same time frame.[35] Some African countries, such as Botswana (from the 1970s to when it achieved economic stability in the 1990s)[36] and Uganda, adopted an open migration policy to stimulate economic development. Uganda is considered "one of the most progressive and generous [countries] in the world [for migrants and refugees]."[37] Uganda insists that migrants have boosted its economy.[38] South Africa is the most significant destination country on the continent for migrants (as opposed to refugees).[39] Importantly, the continent has also taken in over 2 million non-African migrants, including Europeans.[40]

22. A similar trend is discernible in Asia. Although the numbers of non-Asian-born migrants in Asia have remained at relatively low levels as a percentage of its approximately 4 billion population, numbering only about 12 million in 2015,[41] many migrants have taken up residence on that continent in the last two decades or so (most of whom have been Europeans).[42] It should also be noted that in Gulf Cooperation Council countries, such as the United Arab Emirates, Kuwait and Qatar, migrants make up high proportions of the total national populations.[43] For example, in 2015, migrants accounted for 88 per cent of the population in the United Arab Emirates, around 74 per cent in Kuwait and 76 per cent in Qatar.[44]

23. Although, in 2015, nearly one third of the world's international migrants (75 million) lived in Europe, over half of these (40 million) were Europeans.[45] Thus, "European to European" migration was the second largest regional migration corridor in the world in 2015 (after migration from Latin America and the Caribbean to

[35] For example, since 1990, the number of African migrants living outside of the region has more than doubled, with the growth in migration to Europe most pronounced, and about 15 million African-born migrants lived outside the region in 2015; see IOM, *World Migration Report 2018* (Geneva 2017). Available at https://publications.iom.int/system/files/pdf/wmr_2018_en_chapter3.pdf.

[36] Ibid., p. 19.

[37] See World Bank, "Uganda offers refugees a home away from home", 31 August 2016. Available at www.worldbank.org/en/news/feature/2016/08/31/uganda-offers-refugees-home-away-from-home.

[38] Linda Givetash, "How have refugees boosted Uganda's economy?", World Economic Forum, 17 November 2015. Available at www.weforum.org/agenda/2015/11/how-have-refugees-boosted-ugandas-economy/.

[39] See IOM, *World Migration Report 2018*.

[40] Ibid., p. 2.

[41] Ibid., p. 13.

[42] Ibid.

[43] Ibid., p. 14.

[44] Ibid.

[45] Ibid., p. 25.

Northern America).[46] Nonetheless, the population of non-European migrants living in Europe reached over 35 million in 2015.[47] Countries such as Germany and Sweden have taken in large numbers of migrants (and refugees) over the years.[48] In 2015, Germany had the largest foreign-born population in Europe, 12 million.[49] The populations of France and the United Kingdom each included over 7 million foreign-born people in 2015.[50] In 2016, nearly 390,000 people arrived in Europe through the Mediterranean region by both land and sea, over 360,000 of whom arrived by sea.[51] Germany and Sweden took in the bulk of these migrants and refugees.[52] The latter were very good examples of positive expressions of human rights-based international solidarity in the global migration context. It should also be noted, however, that large segments of the populations of many European countries have emigrated to other continents.[53] For example, the United Kingdom has the third largest European emigrant population, numbering almost 5 million.[54]

24. North America is mostly a migrant-receiving region. As at 2015, over 51 million migrants resided in North America.[55] The size of its immigrant population doubled over the 25 years before 2015.[56] The vast majority of immigrants to North America have been Latin American/Caribbean, Asian or European.[57] The United States of America has experienced relatively high levels of immigration for a long time, especially from Europe, Mexico, India and China.[58] The immigrant population of Canada continues to increase significantly and in 2015 about 22 per cent of its total population was foreign born.[59] Canada has comparatively robust legal immigration pathways that can serve as a very good example for other countries.[60] In 2015, Canada admitted over 270,000 new permanent residents through these pathways, the highest number since 2010.[61] Such legal migration pathways are also a positive expression of human rights-based international solidarity in the global migration context.

25. Although the key feature of migration in Latin America and the Caribbean is emigration to North America (nearly 25 million migrants had made the journey north by 2015),[62] there is also a relatively stable inflow of immigrants into the region.[63] By 2015, over 2 million immigrants had arrived in the region.[64] Although it is one of the largest sources of emigration in the world, Mexico is increasingly becoming a host

[46] Ibid.
[47] Ibid.
[48] Ibid., p. 30.
[49] Ibid., p. 27.
[50] Ibid.
[51] Ibid., p. 30.
[52] See Wesley Dockery, "Two years since Germany opened its borders to refugees: a chronology", Deutsche Welle News Agency, 4 September 2017. Available at www.dw.com/en/two-years-since-germany-opened-its-borders-to-refugees-a-chronology/a-40327634; and Timothee De Rauglaudre, translated by Camille Raimondo, "Sweden: refugees should be able to start over", *Le Journal International*, 30 January 2016. Available at www.lejournalinternational.fr/Sweden-refugees-should-be-able-to-start-over_a3474.html.
[53] See IOM, *World Migration Report 2018* (see footnote 38).
[54] Ibid., p. 69.
[55] Ibid., p. 82.
[56] Ibid., p. 82.
[57] Ibid., p. 83.
[58] Ibid., p. 85.
[59] Ibid., p. 85.
[60] See www.npr.org/sections/parallels/2017/01/26/511625609/for-a-stark-contrast-to-u-s-immigration-policy-try-canada.
[61] Ibid., p. 86.
[62] Ibid., p. 82.
[63] Ibid., pp. 79 and 80.
[64] Ibid., p. 81.

country as well.[65] By 2015, its foreign-born population had grown to over 1 million.[66] Argentina and Brazil are also notable in terms of the significant increases that have occurred since 2010 in the sizes of their already large immigrant populations.[67]

The establishment of humanitarian exemptions to anti-smuggling legislation

26. Although many countries around the world criminalize those assisting irregular migrants to enter or remain on their territories and do so without significant regard to the humanitarian nature of the act,[68] a small number of European States have enacted clauses in their immigration laws introducing some kind of humanitarian exemption to these offences. All of these humanitarian exemptions are, to varying degrees, positive expressions of human rights-based international solidarity in the global migration context. These exemptions will be discussed in more detail in a forthcoming report.

Advocacy by States in favour of the rights of irregular migrants and their moral allies

27. Some States have championed the rights of both irregular migrants and their moral allies. For example, a very small group of European Union States had unsuccessfully insisted on a mandatory humanitarian exemption being introduced into the then draft European Union Facilitation Directive.[69] Another excellent example of human rights-based international solidarity in this context is that one European State has recently allowed over 600 migrants and asylum seekers who were initially rejected by another European State to disembark on its territory. These migrants have been allowed a 45-day residency period, after which the authorities will examine each individual case on its "merits".[70] A spokesperson for the Interior Ministry said, "It was a wake-up call for all European Union countries to stop looking the other way and start looking for common solutions."[71] Some States have also made significant efforts to ensure that respect for the human rights of global migrants is integrated into the Global Compact for Safe, Orderly and Regular Migration.

D. Regional laws and practices

28. Some regional-level laws and practices have contributed significantly or have at least aimed to contribute in that measure to the enhancement of human rights-based international solidarity in the global migration context. Building on the foundation laid by the defunct Organization of African Unity (OAU), in 2015, the Assembly of Heads of State and Government of the African Union issued the Declaration on Migration (Doc. Assembly/AU/18(XXV)). The Declaration committed the African Union and its member States to speeding up the implementation of continent-wide visa free regimes and to expediting the operationalization of the single African passport, to be issued by African Union member States, which would facilitate the free movement of persons on the continent. This instrument and the related

[65] Ibid., p. 79.
[66] Ibid., p. 79.
[67] Ibid., p. 80.
[68] See Provera, *The Criminalization of Irregular Migration in the European Union*.
[69] See Rachel Landry, "The 'humanitarian smuggling' of refugees: criminal offence or moral obligation?", Working Paper Series No. 119 (Refugee Studies Centre, University of Oxford, 2016).
[70] Maria Martin, "Migrants on board 'Aquarius' granted 45-day special permit to stay in Spain", *El País*, 18 June 2018. Available at https://elpais.com/elpais/2018/06/18/inenglish/1529305036_939444.html.
[71] Ibid.

implementation measures contribute to enhancing human rights-based international solidarity in the global migration context, because they will allow African migrants easier access to countries that are not their own and obligate those States to accommodate them to the extent required under the instrument.

29. The European Union has also made some efforts to encourage its Member States to work in solidarity with each other to tackle what it sees as the migration crisis that it is facing, and to share the "burdens" and benefits of migration more evenly across its membership than has been the case to date.[72] The European Union has also instituted a visa-free regime within its borders, something that has benefited its citizens and others already within the European Union's external borders.[73] Other positive efforts made by the European Union to strengthen international solidarity for migrants are those to strengthen the rights of unaccompanied minors who migrate to European Union member States. In addition to existing international instruments such as the United Nations Convention on the Rights of the Child, the European Union has enacted policies which will prevent minors being transferred from one European Union State to another and mandated that European Union member States must give minors the chance to file an application for protection once they enter the European Union.[74]

30. Another instance of the positive expression of human rights-based international solidarity in the global migration context by an European regional body is the decision of the European Committee of Social Rights of the Council of Europe in a case brought by the Conference of European Churches (complaint No. 90/2013).[75] In that decision, the Committee concluded that the social welfare system of the country that was being litigated against violates the rights of undocumented migrants and that it is not in conformity with the articles 13.4 (the right to social and medical assistance) and 31.2 (the right to housing) of the European Social Charter. While the Conference of European Churches claimed that there had been a breach of the European Social Charter, the relevant Government claimed that the European Social Charter was not applicable to the case of irregular migrants. The Committee ruled that denying access to housing and health care to adult irregular migrants who were without resources constitutes a violation of the European Social Charter, namely, articles 13.4 and 13.2. The Committee concluded that the relevant Government must provide adequate shelter to undocumented adult migrants, regardless of whether they have been requested to leave the country. The Committee argued, in line with the Conference of European Churches, that access to shelter is a matter of "human dignity" and referred approvingly to the previous case law of the collective complaints mechanism of the European Social Charter with regard to housing and homelessness. Not only is this decision itself an act of solidarity, in the sense that its underlying rationale stems from an understanding of the fact that international human rights law guarantees human rights to all persons, including migrants, it also provides a framework and rationale for a legal obligation on the relevant Governments to express international solidarity to irregular migrants by guaranteeing them certain social rights.

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[72] Ian Traynor, "European Union plans migrant quotas forcing States to 'share' burden", *The Guardian*, 10 May 2015. Available at www.theguardian.com/world/2015/may/10/european-commission-migrant-quota-plan-mediterranean-crisis.

[73] See European Commission, Migration and Home Affairs, "Schengen, borders and visas", 2018. Available at https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas_en.

[74] See Theresa Papademetriou, "European Union: new rules on unaccompanied minors entering the European Union illegally", Global Legal Monitor, 9 July 2014. Available at www.loc.gov/law/foreign-news/article/european-union-new-rules-on-unaccompanied-minors-entering-the-eu-illegally/.

[75] See European Committee of Social Rights, *Conference of European Churches v. the Netherlands*, complaint No. 90/2013. Available at www.coe.int/en/web/turin-european-social-charter/processed-complaints.

E. Global laws and practices

31. Certain global-level laws and practices have the potential to enhance, or have had the effect of enhancing, human rights-based international solidarity in the global migration context. For instance, the Global Compact for Safe, Orderly and Regular Migration, which is currently being negotiated, has the potential to contribute to some extent to the enhancement of the enjoyment of human rights-based international solidarity in the global migration context. Its cooperative framework and its clear objectives (such as minimizing the adverse drivers and structural factors that compel people to migrate, as well as enhancing availability and flexibility of pathways for regular migration) are important in this regard.[76]

32. As mentioned previously, a number of international human rights treaties have guaranteed certain rights either to migrants specifically, or to all human beings in general.[77] The guarantee to migrants of the rights contained in these treaties made among States throughout the world is in and of itself a positive expression of human rights-based international solidarity in the global migration context. For example, both the right to life as contained in the International Covenant on Civil and Political Rights and the right to housing as contained in the International Covenant on Economic, Social and Cultural Rights are clearly ensured to the benefit of migrants, precisely because these rights are guaranteed to everyone. As the *Conference of European Churches* case shows, these textual guarantees of rights can have significant impact in the real world of a migrant's life. Similarly, the distinction made in the Protocol against the Smuggling of Migrants by Land, Sea and Air between organized criminal smugglers and humanitarian actors who assist irregular migrants can and has been beneficial to the latter group; as happened, for example, in the *R v. Appulonappa* case in Canada.[78] Clearly, the rights guaranteed under the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, such as the rights to enjoy treatment that is not less favourable than that which applies to nationals of their host State in terms of remuneration and other conditions of work/employment (art. 25), and to social security (art. 27), are guaranteed to migrants.

33. Adherence by States and other duty-bearers to the right of peoples and individuals to international solidarity, as contained in the draft declaration on the right to international solidarity (see A/HRC/35/35), will greatly enhance the enjoyment of this right by irregular and other migrants, and will serve as an example of the positive expression of human rights-based international solidarity in the global migration context. Although still a draft instrument, it is indicative of the standards to be attained if human rights-based international solidarity is to be realized much more fully in the global migration and other relevant contexts.

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[76] IOM, "Global compact for safe, orderly and regular migration: zero draft", 5 February 2018. Available at https://refugeesmigrants.un.org/sites/default/files/180205_gcm_zero_draft_final.pdf.

[77] See the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime and the Protocol against the Smuggling of Migrants by Land, Sea and Air; see also the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

[78] See https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15648/index.do.

IV. Key international solidarity gaps in the context of global migration

34. Regrettably, many international solidarity gaps remain in the socio-legal responses of States and other stakeholders to global migration flows; often portending or producing highly negative consequences for the human rights of migrants. Such gaps exist in a multiplicity of dimensions and contexts. On the geopolitical plane, significant South-South, North-North and intra-country human rights-based international solidarity gaps are discernible. In terms of issue areas, many legal frameworks for the regulation or protection of migrants, many domestic social protection systems for migrants and many socio-legal arrangements for the regulation of the rendering of humanitarian aid to migrants are riven by certain human rights-based international solidarity gaps. Importantly, not even the civil society realm is exempt from such gaps. For, all too often, significant human rights-based international solidarity gaps also exist in the behaviour of certain elements within civil society towards migrants. Each of these kinds of human rights-based international solidarity gaps will now be discussed and illustrated with a few examples.

A. South-South gaps

35. Within the global South, some countries do significantly more than others to receive and care for global migrants. Geographic proximity is, of course, a key factor that determines which countries absorb more migrants than others. However, other factors — such as the robustness of a country's economy and the friendliness of its migration regime — also play important roles. For example, the fact that the social economy of South Africa is much more robust, relative to almost every other African country is a key factor in attracting the very large numbers of immigrants who now reside there.[79] Most African countries, however, do not do as much as Uganda, Ethiopia, South Africa, and others, to absorb migrants (loosely defined).[80] For example, in a number of African countries (gateways on the African/European migration routes), the record of treating migrants with respect and dignity is very far from exemplary. As the International Organization for Migration, for example, has found, protection challenges and serious human rights violations along these corridors are profound and include deaths at sea, in the desert and in other transit locations; enslavement, disappeared migrants, exploitation, physical and emotional abuse, trafficking, smuggling, sexual and gender-based violence, arbitrary detention, forced labour, ransom demands and extortion; and other human rights violations.[81] In Latin America, new and diversified flows throughout the region have prompted a response by transit and destination countries to increase border enforcement and protection.[82] All of the issues discussed in this paragraph point to a set of important human rights-based international solidarity gaps that need to be robustly and urgently redressed.

B. North-North gaps

36. A similar human rights-based international solidarity gap exists within the global North, where a small number of countries tend to carry the bulk of the responsibility of absorbing global migration flows (loosely defined), in particular flows originating from the global South. Despite recent trends in the opposite

[79] See IOM, *World Migration Report 2018*.
[80] Ibid., pp. 44–54.
[81] Ibid., pp. 50.
[82] Ibid., pp. 75–81.

direction, countries such as Sweden, Canada, Germany, France and the United States have historically stood out (whatever their current positions).[83] Another group of countries, mainly in Eastern, Central and Southern Europe, have stood out as resisting pressure to do their fair share in this regard.[84] Leaders in two Eastern European countries have even gone as far as claiming that taking in migrants will detract from the "christianness" and "cultural purity" of Europe.[85] The new leadership in one Southern European country is pursuing ever more hard-line anti-immigrant policies.[86] Anti-immigrant barriers have also been raised in many other countries of the global North, including a major North American country, where a new populist regime has been pursuing a harsh crackdown on immigration.[87] The key point here, however, is the disproportionate absorption of migrant flows over time by only a handful of global North countries. Clearly, there is a human rights-based international solidarity gap here that needs to be filled through greater international cooperation and action in this area.

37. Similarly, within the European Union, the division of responsibility for the management and absorption of migrant flows from outside Europe has been largely disproportionate, whether assessed on a per capita basis or in terms of the aggregate amount of resources available to the countries concerned to deal with such flows. Here again, a very small group of States has, at least until very recently, tended to assume the bulk of the responsibility: Sweden and Germany being the most notable.[88] The recent spat between two European countries over the refusal of one of them to allow migrants to disembark at one of its sea ports from a boat that had rescued them in distress at sea aptly illustrates, not just the increasing lack of solidarity of the Government concerned in this kind of context, but also the need for a clearer, more structured and more equitable distribution of responsibility among European States in this area.[89] This is a human rights-based international solidarity gap in the migration context that needs to be addressed through urgent intra-European Union cooperation and action. Despite its limitations, the recent agreement of 28 June

[83] United Nations, Department of Economic and Social Affairs, "International migration report 2015 (highlights)", 2016. Available at www.un.org/en/development/desa/population/migration/publications/migrationreport/docs/MigrationReport2015_Highlights.pdf; Chris Harris, "Fact check: how many refugees has each European Union country taken in?", Euronews, 26 September 2017 (see table "How many of the 160,000 each country took in"). Available at www.euronews.com/2017/09/26/fact-check-how-many-refugees-has-each-eu-country-taken-in.

[84] Gabriela Baczynska and Sara Ledwith, "How Europe built fences to keep people out", Reuters, 4 April 2016. Available at www.reuters.com/article/us-europe-migrants-fences-insight-idUSKCN0X10U7.

[85] See Faiola and Birnbaum, "Pope calls on Europe's Catholics to take in refugees" (see footnote 9); see also Shaun Walker, "Hungarian leader says Europe is now 'under invasion' by migrants", *The Guardian*, 15 March 2018. Available at www.theguardian.com/world/2018/mar/15/hungarian-leader-says-europe-is-now-under-invasion-by-migrants.

[86] See Steve Scherer and Massimiliano Di Giorgio, "Italy and France try to patch up migrant row, draw papal rebuke", Reuters, 14 June 2018. Available at www.reuters.com/article/us-europe-migrants-italy/italy-and-france-try-to-patch-up-migrant-row-draw-papal-rebuke-idUSKBN1JA1D6.

[87] See Stephen Collinson, "United States reckons with Trump's war on immigration", CNN, 14 June 2018. Available at www.cnn.com/2018/06/14/politics/donald-trump-immigration-jeff-sessions/index.html.

[88] See Rachael Cerrotti, "Sweden was among the best countries for immigrants. That's changing", Public Radio International: Global Post, 11 September 2017. Available at www.pri.org/stories/2017-09-11/sweden-was-among-best-countries-immigrants-thats-changing; and De Rauglaudre (translated by Camille Raimondo), "Sweden: refugees should be able to start over" (see footnote 55).

[89] See Scherer and Di Giorgio, "Italy and France try to patch up migrant row, draw papal rebuke".

2018,[90] reached in Brussels by European Union States, is designed in part to share the benefits and burdens of global migration flows to Europe.

C. Intra-country gaps in the social and legal protection of migrants

38. Unfortunately, anti-migrant rhetoric, populism and xenophobia are on the rise and have formed a part of customary State practice in all too many countries around the world, leading to harsh anti-immigrant sentiments, policies, laws and practices. Throughout the world, rhetoric about the supposed threat that immigrants pose to national identity is on the rise, and is in some countries even echoed or utilized by the governing elites.[91] In one powerful North American country, senior government officials have too often used racist and xenophobic language to describe immigrants and have also tended to pursue very harsh anti-immigrant policies, laws and practices, such as separating children from their parents in order to discourage irregular migration,[92] banning Muslims from certain countries from entering its territory (albeit with some exceptions)[93] and attempting to punish sanctuary cities.[94] These facts alone are evidence of some of the serious human rights-based international solidarity gaps that exist within many countries in relation to the management of global migration. This is because such laws, policies and rhetoric are not predicated on a recognition of our common humanity and are motivated not by a view of individual migrants as human beings and rights-holders, but rather as members of amorphous groups that are asserted as presenting a threat.

39. Similar serious human rights-based international solidarity gaps in relation to the protection of migrants can be found in other parts of the world. In the African context, there has been a trend towards the securitization of immigration in many countries on that continent, i.e., the treatment of migration as primarily a matter of national security. For example, one East African country at one point announced plans to build a wall on its borders with one of its neighbours and has also directed all urban refugees to refugee camps and ordered mass arrests of irregular migrants.[95] While the Independent Expert is cognizant of the security needs of the countries concerned, it should be noted that the pursuit of such securitization measures might lead to serious human rights-based international solidarity deficits. This is because these measures can too often lead to the undue association of migrants with security threats to the country concerned, their mistreatment at the hands of the agents of that State and the reinforcement of existing mental and physical barriers to engendering a wider sense of our inherent humanity and belonging.

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[90] See Reuters, "Details of European Union agreement on migration", 29 June 2018. Available at www.reuters.com/article/us-eu-summit-conclusions-migration/details-of-eu-agreement-on-migration-idUSKBN1JP0DS.

[91] See Faiola and Birnbaum, "Pope calls on Europe's Catholics to take in refugees" (see footnote 9).

[92] See Office of the United Nations High Commissioner for Human Rights (OHCHR), "United Nations experts to United States: 'release migrant children from detention and stop using them to deter irregular migration'", 22 June 2018. Available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23245&LangID=E.

[93] See Executive Order #13769, Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed Reg 8977 27 January 2017. This Executive Order was subsequently amended after being suspended/struck down by the courts; see Executive Order #13780, Protecting the Nation from Foreign Terrorist Entry into the United States, 82 Fed Reg 13209 6 March 2017. This very similar second order was also struck down by the courts. However, the United States Supreme Court later upheld it, albeit within certain limits.

[94] See Reuters, "United States Justice Department sues California over its 'sanctuary' laws", 7 March 2018. Available at www.cnbc.com/2018/03/07/us-justice-department-sues-california-over-its-sanctuary-policies.html.

[95] See African Union, "Evaluation of the African Union migration policy framework for Africa".

40. Significant human rights-based international solidarity gaps also exist in relation to the guarantee of social rights to migrants around the world. For example, in response to the social protection gaps that exist under the laws of one European Union country, the European Committee of Social Rights has, as we have seen, decided that that country's system, which does not extend the right to emergency social and medical assistance under article 13 (4) of the European Social Charter to irregular migrants, was in violation of its obligations under the European Social Charter,[96] as the article grants foreign nationals entitlement to such assistance. The beneficiaries of this right to social and medical assistance are foreign nationals who are lawfully present in a particular country but do not have resident status and those who are in an irregular situation. While the European Committee of Social Rights has affirmed that States are required to provide accommodation, food, emergency care and clothing for those concerned, in order for them to cope with an immediate state of need, States are not required to apply other extended social protection floors, such as guaranteed income arrangements, to irregular migrants.[97] The same is true in many other States that have set up comprehensive social protection policies, such as the right to education, health care, adequate housing and employment, that are restricted to nationals and certain categories of migrants. For instance, it is quite common in the Middle East and in South-East Asia for many migrants to struggle to access social protection services, sometimes in part linked to abusive recruitment practices for migrant workers.[98] In addition, the requirements for official documentation to access these kinds of social protection places irregular migrants in a particular position of vulnerability, as they face poverty and discrimination in their access to social and economic rights (see A/68/333 and A/71/285).

D. Civil society gaps

41. Against civil society's most well-known and celebrated tendency to serve as a bulwark for human rights within the global migration context, elements within it can sometimes act in ways that undermine human rights, including the proposed right to international solidarity. Anti-immigrant groups or mobs around the world have provided ample evidence of this tendency. For example, Defend Europe and other such groups have seized upon the manufactured narrative around the participation of non-governmental organizations in human trafficking to launch a struggle against humanitarian non-governmental organizations showing human rights-based international solidarity by undertaking rescues at sea of migrants at risk of death.[99] The anti-immigrant boat operation by Defend Europe was launched with the aim of actively disrupting such organizations as they sought to express international solidarity in that way to global migrants. While Defend Europe had to abandon its mission because of its disruption by "antifascists," it was to claim success by arguing that certain States in the Mediterranean region had already done its job for it.[100]

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[96] European Committee of Social Rights, *Conference of European Churches v. the Netherlands*, complaint No. 90/2013, decision on the merits of 1 July 2014 (see footnote 78).

[97] See Council of Europe, European Committee of Social Rights, Conclusions XIV-1, United Kingdom, p. 845; Conclusions XIII-4, Statement of Interpretation on Article 13, pp. 54–57; Conclusions XIV-1, Netherlands, p. 598; Conclusions XIV-1, Iceland, p. 417.

[98] Economic and Social Commission for Asia and the Pacific, "Asia-Pacific migration report 2015: migrants' contributions to development". Available at www.unescap.org/sites/default/files/SDD%20AP%20Migration%20Report%20report%20v6-1-E.pdf.

[99] See Liz Fekete, Frances Webber and Anya Edmond-Pettitt, "Humanitarianism: the unacceptable face of solidarity" (London, Institute of Race Relations, 2017).

[100] See Maya Oppenheim, "Defend Europe: far-right ship stopping refugees ends its mission after a series of setbacks", *The Independent*, 21 August 2017. Available at www.independent.co.uk/news/world/europe/defend-europe-far-right-ship-stop-refugees-mediterranean-end-mission-c-star-setbacks-migrant-boats-a7904466.html.

Defend Europe is still operating, "with some far-right activists now prepared to resort to open violence".[101] What is more, "powerful extreme-right electoral parties are also mobilizing, and vigilante and even paramilitary organizations are emerging" to take action against "those who act in solidarity with refugees and migrants."[102] Racist civil society groups such as "the alternative right" are opposed to any form of solidarity with migrants or the protection of the basic rights of migrants.[103] There have also been other high-profile campaigns against the expression of solidarity with migrants, the targeting of certain non-governmental organizations and their volunteers and claims of defending Europe from migrants and refugees.[104] As troubling is the fact that, in certain countries, private individuals and groups have organized themselves to patrol their country's borders or round up irregular migrants.[105] In one African country, as elsewhere, despite the efforts of many Governments to prevent it, individuals and mobs have too often set upon migrants and attacked, maimed or killed them.[106] All these are serious international solidarity gaps — caused by the actions of regressive civil society groups — that need to be addressed more effectively through focused local and international action.

V. Abusive deployment of international solidarity in the context of global migration

42. Despite the many good human rights-based international solidarity practices that have been discussed previously, there have also been all too many instances and situations in which international (in particular, inter-State) solidarity has, unfortunately, been either abusively deployed or utilized in ways that do not protect the human rights of global migrants. Thus, international solidarity (defined as a unity of purpose and action) has sometimes been expressed in a way that undermines human rights, amounting to an abuse of solidarity. Examples of the instances and situations in which this kind of "instrumentalization"[107] of international solidarity has occurred will be discussed in the remainder of this section.

43. Many such instances and situations have arisen as a result of the execution of the European Union's "prevention agenda" in relation to global migration, in particular across the Mediterranean Sea. As one scholar has correctly noted, this agenda "seeks to prevent migrants from reaching the coastal shore as to be able to commence their maritime journey [across the Mediterranean Sea]; it seeks both to incentivize migrants to use legal routes and equally deter them through security measures from boarding."[108] As she also observes, "this agenda is targeted primarily through cooperation with third countries, alternative legal avenues, and by a form of deterrence that is sought to be secured through reinforced border surveillance".[109] Other instances and situations in which international solidarity has been

[101] Fekete, Webber and Edmond-Pettitt, "Humanitarianism", p. 31.

[102] Ibid., p. 32.

[103] Ibid.

[104] Ibid., pp. 34 and 35.

[105] See Viceland, "We met the vigilantes patrolling the US-Mexico border", 6 March 2018. Available at www.vice.com/en_ca/article/kzpj7v/we-met-the-vigilantes-patrolling-the-us-mexico-border; and Csaba Tibor Toth, "Volunteers and vigilantes watch over refugees in Hungary", Deutsche Welle, 28 August 2015. Available at www.dw.com/en/volunteers-and-vigilantes-watch-over-refugees-in-hungary/a-18677868.

[106] See Dapo Akinrefon and others, "Xenophobic attacks: efforts to stop killings in S-Africa not working — FG", *The Vanguard*, 18 May 2018. Available at www.vanguardngr.com/2018/05/991733/.

[107] See Allsopp, "Contesting *fraternité*" (see footnote 7).

[108] See Basaran, "Saving lives at sea" (see footnote 6).

[109] Ibid.

instrumentalized in ways that result in the violation of the rights of global migrants can be found in North America as a result of pressure by a strong State in that region on a neighbouring country to limit the transit of Central American migrants through the latter's territory; and in the coerced or pressured "voluntary" returns of migrants from their "host" States to their home countries, with the (often incentivized) cooperation of that State.[110]

44. The 2015 joint action plan between the European Union and a country on the border of Europe and Asia to stem the flow of migrants into the European Union area is one of the products of the implementation of the European Union's prevention agenda. According to one study, under the agreement, signed on 29 November 2015, the European Union will provide €3 billion to the country concerned to manage the migrant/refugee situation in that country, aimed at preventing such persons from reaching European Union countries.[111] Under the joint action plan, that country will be in charge of sea patrols and enforce border restrictions to manage the flow of migrants/refugees to Europe, combat human trafficking and passport forgeries and return migrants to their countries of origin if they do not meet refugee requirements, thereby becoming a "wall of defence" against what the European Union sees as a flood of refugees into its territory.[112] The clear intent of the European Union in signing the agreement can be seen in the report of 10 February 2016 published by the European Commission on the progress of the country concerned in implementing the joint action plan.[113] Among the conclusions and recommendations contained in the report are that the partner country needs to, inter alia, "make significant progress in preventing irregular departures of migrants and refugees from its territory."[114]

45. While the European Union and the country concerned are of course entitled to cooperate and act in solidarity with each other in the global migration context, and while European Union States enjoy certain (non-absolute) sovereign rights to limit entry into their territories, "the spirit in which this joint action plan was drafted, with the intention to limit migrants from entering the European Union" at a time of great need,[115] is troubling from the perspective of the protection of international solidarity in the effort to protect global migrants and their human rights. This is because shutting the door to migrants in such a way at a time when they are in desperate situations does not advance the protection of their human rights, and likely endangers these rights, as the alternative pathways to enter Europe are few and far between. What is more, as one scholar has correctly noted, although the European Union's partner country in the current regard is to be commended for hosting one of the world's largest migrant/refugee populations, there is good cause to worry about the human rights situation there. For instance, in February 2018, the European Committee of Social Rights issued a statement calling on that country to protect the rights of migrants and refugees in the aftermath of the state of emergency that had been declared there.[116] Thus, this Agreement can be faulted, to some extent, as an instance of the deployment

[110] See, for example, Rodrigo Dominguez-Villegas and Victoria Rietig, "Migrants deported from the United States and Mexico to the northern triangle: a statistical and socioeconomic profile" (Washington, D.C., Migration Policy Institute, 2015).

[111] See Library of Congress, Global Legal Research Center, "Refugee law and policy in selected countries" (Turkey), 2016. Available at www.loc.gov/law/help/refugee-law/turkey.php.

[112] See the EU/Turkey 2015 Joint Action Plan, 29 November 2015.

[113] See European Commission, EU-Turkey joint action plan: implementation report, 10 February 2016, COM (2016) 85 final, annex 1.

[114] Ibid.

[115] See Elizabeth Collett, "The paradox of the European Union-Turkey refugee deal", Migration Policy Institute, 2016. Available at www.migrationpolicy.org/news/paradox-eu-turkey-refugee-deal.

[116] See www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B8-2018-0091&language=EN.

of international solidarity in the global migration context that detracts, or at least could detract, from the protection of the human rights of global migrants.

46. The attempts by both the European Union and individual European States to act in solidarity with a currently unstable North African country in order to stem the flow of migrants into the European Union area is another example of the deployment of international solidarity in the global migration context that harms, or at least has the potential to harm, the human rights of migrants. For example, in return for funding, the "authorities in this conflict-ridden country have now signed and implemented a number of such agreements with certain European Union countries".[117] These agreements do not tend to emphasize or even mention, in a substantive way, the protection of the human rights of migrants.[118] For its own part, the European Union has adopted at least seven different programmes under the European Union Emergency Trust Fund for stability and addressing root causes of irregular migration in Africa, all directed at this particular country.[119] The European Union argues that the programmes are part of its international cooperation efforts aimed at expressing solidarity with global migrants so as to prevent humanitarian emergencies at sea, stop human trafficking/smuggling, and ensure capacity-building for the authorities in the relevant country.[120] Yet these programmes tend to feed into the European Union's control-centric focus in its global migration cooperation with the country concerned here; i.e., its objective of stemming the flow of migrants who seek to reach Europe by crossing North Africa and the Mediterranean Sea. The well-known fact that the human rights of migrants have been and are being seriously abused in that country makes the focus of these agreements on preventing global migrants from departing from there and entering Europe troubling from a human rights perspective.[121] Unfortunately, therefore, the deployment of international solidarity has in this case conduced to the violation of the human rights of global migrants.[122]

47. As has been discussed above, under pressure from a powerful North American country, a neighbouring country has implemented a border enforcement plan to shut its borders to Central Americans fleeing gang violence and serious economic deprivation in their own countries and prevent them from reaching that country's northern neighbour, which is the preferred destination of most of them.[123] This country now serves as a first line of defence against these migrants for its powerful neighbour. However, this plan has not deterred the flow of Central American migrants to both countries and has only made their journeys towards the stronger country

[117] For example, see the Italy-Libya Memorandum of Understanding, 2 February 2017; see also Anja Palm, "The Italy-Libya memorandum of understanding: the baseline of a policy approach aimed at closing all doors to Europe?", Istituto Affari Internazionali, 2 October 2017. Available at http://eumigrationlawblog.eu/the-italy-libya-memorandum-of-understanding-the-baseline-of-a-policy-approach-aimed-at-closing-all-doors-to-europe/.

[118] Ibid.

[119] See European Commission, "EU Emergency trust fund for Africa: Libya". Available at https://ec.europa.eu/trustfundforafrica/region/north-africa/libya_en.

[120] Ibid.

[121] See Amnesty International, "Libya's dark web of collusion: abuse against Europe-bound refugees and migrants" (London, 2017). Available at www.amnesty.org/download/Documents/MDE1975612017ENGLISH.PDF.

[122] See OHCHR, "Libya must end 'outrageous' auctions of enslaved people, United Nations experts insist", 30 November 2017. Available at www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22475&LangID=E.

[123] See Azam Ahmed, "Step by step on a desperate trek by migrants through Mexico", *New York Times*, 8 February 2016. Available at www.nytimes.com/2016/02/08/world/americas/mexico-migrants-central-america.html.

significantly more treacherous, thereby imperilling a number of their human rights, including their rights to life, dignity and liberty.[124]

48. While every State is entitled (within limits) to manage its borders as it sees fit, such sovereignty is clearly not absolute. The management and control of borders cannot be effected in a way that imperils certain of the most basic human rights of global migrants — such as their rights to life and dignity. While global migrants assume some risk in deciding to embark on such perilous journeys in the first place, the Independent Expert is of the view that the aggravation of that risk by the laws, policies and practices of home, transit or destination States to the extent of imperilling their fundamental rights clearly violates international human rights law.

VI. Conclusions and recommendations for human rights-based reform

49. In the present report, the Independent Expert has considered many of the issues that affect human rights-based international solidarity in our current global migration context. Given the salience and importance of both human rights-based international solidarity and global migration in our time, and in particular with regard to the imperative need to protect global migrants from serious and rampant violations of their human rights around the world, States, civil society and other stakeholders must vastly increase their efforts to address the concerns raised in the present report. The central role of the General Assembly in ensuring that this preferred course is taken cannot be over-emphasized. The Independent Expert hopes that this august assembly will rise to the challenge, including through ensuring the adoption and robust implementation, and if necessary revision, of the Global Compact for Safe, Orderly and Regular Migration.

50. In the light of the above discussion, the Independent Expert makes a few key recommendations to States and other stakeholders, as follows:

(a) A mindset reset: a change in the prevalent socio-legal mindset about global migration is urgently needed in almost every country. As one global leader has noted, rather than view global migrants as "threats to our comfort," all countries, civil society and peoples must work even more closely together to ensure respect for the dignity and human rights of global migrants, and to create a socio-legal environment that values them as "persons whose life experience and values can contribute greatly to the enrichment of our society;"[125]

(b) The expansion and celebration of pro-migrant solidarity: The positive expressions of human rights-based international solidarity by elements within civil society, cities and other local governments, States and regional organizations, and at the global level, should be reinforced, expanded, supported by others and celebrated more widely as imperative pro-human rights and pro-humanitarian acts that save the lives of thousands of global migrants; ensure that they are treated with the dignity to which they are entitled; and advance global integration, development and justice;

(c) The urgent creation of regular migration pathways: States which have not created pathways for regular migration from around the world are strongly encouraged to do so on an urgent basis, in order to help alleviate the pressure on global migrants to migrate in an irregular fashion. The Independent Expert is

[124] Ibid.

[125] See Scherer and Di Giorgio, "Italy and France try to patch up migrant row, draw papal rebuke".

pleased to see that this key human rights-based international solidarity concern is likely to be addressed to some extent in the Global Compact for Safe, Orderly and Regular Migration, which is currently under negotiation;

(d) The expansion of existing regular migration pathways: States that have already created pathways for regular migration into their territories are strongly encouraged to enact laws and take other measures to ensure a significant expansion of the numbers of global migrants accommodated through such avenues. The Independent Expert is also pleased to see that this issue is likely to be addressed, to some extent, in the Global Compact;

(e) A more effective European Union internal solidarity mechanism: more effort needs to be made by European Union States to implement in effective and just ways its internal solidarity mechanisms for sharing and managing the global migrants that seek to enter the European Union area. The Independent Expert welcomes the increased efforts that have been made in this regard, including the agreement reached in Brussels on 28 June 2018;

(f) Delegitimize extremism and populist antagonism against global migrants: Consistent with their obligations under articles 4 and 7 of the Convention on the Elimination of All Forms of Racial Discrimination, States should make greater efforts (within the limits of the rights of everyone to freedom of expression and association) to discourage and delegitimize extremism and populist antagonism and rhetoric against migrants. These ills strongly negate the values of human rights-based international solidarity and run contrary to the proposed draft declaration on the right to international solidarity;

(g) End or modify efforts to externalize continental borders: efforts to externalize the borders of continental or regional arrangements to other continents and regions, through the adoption of international agreements of the sort that tend to undermine rather than bolster the human rights and dignity of migrants, should be strongly discouraged. Such agreements tend to lead to significant human rights violations, offend the spirit of human rights-based international solidarity and run contrary to the letter of the draft declaration on the right to international solidarity.

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Promotion and protection of human rights: implementation of human rights instruments

Seventieth anniversary of the Universal Declaration of Human Rights: reaffirming and strengthening the prohibition of torture and other cruel, inhuman or degrading treatment or punishment**

Note by the Secretary-General

The Secretary-General has the honour to transmit to the members of the General Assembly the interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Nils Melzer, submitted in accordance with General Assembly resolution 72/163.

* A/73/150.

** The present document was submitted late to the conference services without the explanation required under paragraph 8 of General Assembly resolution 53/208 B.

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Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment

Summary

As the international community prepares to celebrate the seventieth anniversary of the Universal Declaration of Human Rights, the Special Rapporteur, in the present report, examines the achievements made on the road to realizing the absolute prohibition of torture and ill-treatment and reflects on the primary challenges facing its universal implementation today.

18-12051

I. Introduction

1. The year 2018 marks the seventieth anniversary of the 1948 Universal Declaration of Human Rights. In the Declaration, which arose in the aftermath of the Second World War, it is acknowledged that "disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind" and that the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".

2. Epitomizing this new world order based on human rights and dignity, it is proclaimed in article 5 of the Declaration that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". Thenceforth, there was to be an intransgressible barrier to torture and ill-treatment,[1] protecting all human beings, without exception or discrimination of any kind and regardless of jurisdiction, territory and nationality.

3. The universal and absolute prohibition of torture and ill-treatment reflects the recognition that such abuse dehumanizes not only its victims, but also its perpetrators and, ultimately, any society in which such practices are knowingly tolerated. Torture and ill-treatment inflict lasting trauma, cripple all bonds of humanity and seriously damage entire communities. In its resolution 3452 (XXX), the General Assembly rightly declared any act of torture or ill-treatment an offence to human dignity and "a denial of the purposes of the Charter of the United Nations" (annex, para. 2).

4. In view of the fundamental importance of the prohibition of torture and ill-treatment for the maintenance of international public order and based on broad stakeholder consultations, the Special Rapporteur, in the present report, takes stock of what has been achieved over the past seven decades in terms of making it a practical reality, examines some of the most serious challenges facing its universal implementation today and offers recommendations on how best to meet those challenges. To avoid any perception of contextual bias, references to individual State practice and related jurisprudence is made only in support of points of law and not points of fact.

II. Achievements

A. International normative framework

1. Recognition of the prohibition

5. Since the international community unequivocally condemned torture and ill-treatment in the Universal Declaration of Human Rights, the legally binding prohibition of such abuse has been codified in human rights treaties, including the International Covenant on Civil and Political Rights of 1966 (art. 7), the European Convention on Human Rights of 1950 (art. 3), the American Convention on Human Rights of 1969 (art. 5), the African Charter on Human and Peoples' Rights of 1981 (art. 5), the Arab Charter on Human Rights of 2004 (art. 8), the Convention on the Rights of the Child of 1989 (art. 37), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990 (art. 10) and the Convention on the Rights of Persons with Disabilities of 2006 (art. 15). It is also reaffirmed in the ASEAN Human Rights Declaration of 2012 (art. 14). The prohibition of torture and ill-treatment "at any time and in any place whatsoever" has also been authoritatively recognized to reflect a general principle of law, namely

[1] "Ill-treatment" refers to cruel, inhuman or degrading treatment or punishment other than torture.

"elementary considerations of humanity, even more exacting in peace than in war".[2] Under the Rome Statute of the International Criminal Court of 1998, the systematic or widespread practice of torture and other inhuman acts of a similar character constitute crimes against humanity (art. 7) and, where committed for reasons related to armed conflict, war crimes (art. 8). The prohibition of torture and other ill-treatment is unanimously recognized as a core principle of customary international law, and the prohibition of torture is also universally recognized as having attained peremptory status (jus cogens).

2. Definition of torture and ill-treatment

6. Significant progress has also been made in identifying the defining elements of torture and ill-treatment. Several international instruments contain express definitions of torture, most notably article 1 of the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1975, article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, article 2 of the Inter-American Convention to Prevent and Punish Torture of 1985 and article 7 (2) (e) of the Rome Statute of the International Criminal Court. Although those instruments do not define torture in identical terms and none precisely defines other forms of ill-treatment, they have provided a solid basis for the clarification of both concepts in international and national jurisprudence, State practice and soft law instruments, and also through civil society advocacy and academic writing.[3] As a result, largely coherent core concepts have emerged for both torture and ill-treatment based on elements that authoritatively delineate the prohibited conduct.

7. As a generic concept, torture denotes the intentional infliction of pain or suffering on a powerless person to achieve a particular purpose, whereas ill-treatment denotes any other cruel, inhuman or degrading treatment or punishment, which does not necessarily require the intentionality and purposefulness of the act or the powerlessness of the victim (A/72/178, para. 31, and E/CN.4/2006/6, paras. 38–41). While human rights treaties establish obligations exclusively for States and, therefore, define torture and ill-treatment as acts perpetrated with the involvement of State officials, no State involvement is required for finding torture or ill-treatment under international criminal or humanitarian law. Torture and ill-treatment can take an almost endless variety of forms that cannot be catalogued in an exhaustive manner, ranging from police violence, intimidation and humiliation to coercive interrogation, from denial of family contacts or medical treatment to the instrumentalization of drug withdrawal symptoms, and from inhuman or degrading detention conditions to prolonged arbitrary detention or abusive solitary confinement, to name a few (see, for example, A/72/178, paras. 46–47, and A/HRC/37/50, paras. 26–29). While the manifold manifestations of torture and ill-treatment may not always involve the same severity, intentionality and purposeful instrumentalization of pain or suffering, all involve violations of physical or mental integrity that are incompatible with human dignity.

3. Standard-setting for national implementation

8. The specific duties of States to implement the prohibition of torture and ill-treatment are set out in a number of international instruments, spearheaded by General Assembly resolution 3452 (XXX). Most importantly, under the Convention against

[2] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgments, I.C.J. Reports 1986* (p. 14), with reference to the *Corfu Channel* case *(United Kingdom of Great Britain and Northern Ireland v. Albania), I.C.J. Reports 1949* (p. 4).

[3] Office of the United Nations High Commissioner for Human Rights, "Interpretation of torture in the light of the practice and jurisprudence of international bodies", 2011.

Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, States are obliged to criminalize torture, investigate alleged violations and prosecute perpetrators, provide redress and rehabilitation to victims, and adopt a wide range of preventive measures. The Optional Protocol to the Convention, which entered into force in 2006, provides for monitoring, at the national and international levels, of the implementation of the Convention wherever persons may be deprived of their liberty.

9. In many regions of the world, a decisive contribution has been made by the constant and increasingly progressive jurisprudence of international human rights mechanisms and criminal tribunals, but also by regional treaties focused on giving effect to the prohibition, such as the Inter-American Convention to Prevent and Punish Torture of 1987 and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment of 1987, and by a wide range of soft law instruments, such as: the revised Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules); the Code of Conduct for Law Enforcement Officials; the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; the Principles of Medical Ethics Relevant to the role of health personnel, particularly physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman or degrading treatment or punishment; the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Istanbul Protocol); the Minnesota Protocol on the Investigation of Potentially Unlawful Death; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules); the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines); the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules); the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules); the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (Robben Island Guidelines) and the European Prison Rules.

B. International institutional framework

10. Since 1948, an impressive institutional framework has been established specifically to prevent torture and ill-treatment. In addition to the judicial and quasi-judicial treaty bodies that oversee the implementation of the general human rights instruments and the international criminal courts and tribunals that adjudicate a broad range of crimes, some international mechanisms focus on the prohibition of torture and ill-treatment.

11. The Committee against Torture, which is made up of independent experts, monitors the implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by reviewing the reports of States parties, hearing individual complaints and carrying out inquiries. The Committee also publishes its interpretation of specific treaty provisions in the form of general comments.

12. Under the Optional Protocol to the Convention, the Committee is complemented by the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Subcommittee on Prevention of Torture). Each State party to the Optional Protocol is required to set up a national preventive mechanism (NPM). During official visits to States, the Subcommittee can access any place where persons may be deprived of their liberty. It also advises Governments on how to establish NPMs and ensure that they function effectively. According to the Optional Protocol, the mandate of NPMs includes regularly examining the treatment of persons deprived of their liberty, making recommendations with a view to strengthening their

protection against torture and ill-treatment and making proposals with regard to draft and existing legislation (arts. 17–23).

13. Since its establishment in 1981, the United Nations Voluntary Fund for Victims of Torture has provided more than $180 million in aid through grants to more than 630 organizations worldwide.[4]

14. First appointed in 1985, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment is mandated by the Human Rights Council to examine issues of torture and ill-treatment in all States Members and observer States of the United Nations, regardless of their treaty obligations. The mandate involves transmitting urgent appeals to States on behalf of individuals at risk of torture or ill-treatment and communications on allegations of past violations, undertaking fact-finding country visits and submitting thematic and activity reports to the Human Rights Council and the General Assembly.

15. The four anti-torture mechanisms are supported through the Office of the United Nations High Commissioner for Human Rights (OHCHR), which promotes and protects human rights, including the prohibition of torture and ill-treatment, through standard-setting, monitoring and implementation on the ground.

16. Outside the United Nations, the International Committee of the Red Cross (ICRC) operates worldwide as an impartial humanitarian organization to promote respect for international humanitarian law, including through visits to persons deprived of their liberty for reasons related to armed conflicts. The Geneva Conventions of 1949 oblige parties to international armed conflicts to provide ICRC with access to prisoners of war and other protected persons; under article 3 of the Conventions, States and non-State belligerents are encouraged to do the same in armed conflicts that are not of an international character.

17. Those universal bodies are complemented by monitoring and implementation mechanisms established through regional instruments.

18. In sum, since 1948, the international community has developed a wealth of normative standards and institutional mechanisms to make the universal and absolute prohibition of torture and ill-treatment a reality. Despite these remarkable achievements, however, the practice of torture and ill-treatment remains widespread around the world and public tolerance for them seems to be on the rise again. In the view of the Special Rapporteur, the situation can be traced primarily to shortcomings in national implementation, challenges to the prohibition of torture and ill-treatment, impunity and discrimination.

III. Challenges

A. Ratification of international instruments

19. The first step towards national implementation of the international framework is for States to adopt and ratify the relevant treaties. The decision to do so is not entirely at the discretion of individual States, given the reaffirmation of human rights and dignity contained in the Charter of the United Nations, the provision in the Universal Declaration of Human Rights that "everyone is entitled to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realized" (art. 28) and the peremptory character of the prohibition of torture and ill-treatment itself.

[4] See https://www.ohchr.org/Documents/Issues/Torture/UNVFVT/BrochureUNVFVT.pdf.

20. Many States have adopted universal and regional anti-torture instruments over the past seven decades: the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (164 States parties; 7 signatories); the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (88 States parties; 14 signatories); the International Covenant on Civil and Political Rights (171 States parties; 6 Signatories); the Geneva Conventions of 1949 (196 States parties) and their Additional Protocol I (174 States parties; 3 signatories) and Additional Protocol II (168 States parties; 3 signatories); and the Rome Statute of the International Criminal Court (123 States parties; 15 signatories).[5]

21. Despite this historically unprecedented commitment, further efforts are needed. States accounting for a sizeable portion of the world's population still have not, or not sufficiently, formalized their commitment by adopting, without reservation, treaties requiring the establishment of a normative, institutional and policy framework to effectively implement the prohibition of torture and ill-treatment.

B. National implementation

1. National legal framework

22. Beyond the formal recognition of their international legal obligations with regard to the prohibition and prevention of torture and ill-treatment, whether derived from treaty instruments, custom or general principles of law, States must also adopt legislative, regulatory, procedural and practical measures for their effective implementation throughout their jurisdiction, particularly in places of detention, but also in the context of law enforcement, the policing of assemblies, immigration control and active protection from various forms of interpersonal violence.

(a) Criminalization

23. In order to prevent torture and ill-treatment, such abuse must be adequately criminalized and effectively prosecutable under national law.[6] Unfortunately, many national criminal codes still do not recognize torture as a distinct offence, employ an excessively narrow definition of that crime, or fail to criminalize its perpetration by mere consent or acquiescence of a public official. In many cases, national legislation fails to provide for sanctions reflecting the gravity of torture, for the exercise of universal jurisdiction or for the removal of statutes of limitation or immunities in respect of torture and ill-treatment.

(b) Investigation, accountability and redress

24. The duty of States to investigate allegations of torture and ill-treatment and, in case of violations, to provide for accountability, reparation and rehabilitation,[7] is of fundamental importance with a view to ensuring justice, reconciliation and the rule of law, and preventing future violations. Nevertheless, many national legal systems still do not adequately guarantee those rights, and even establish legal obstacles to their implementation, such as limitation periods and immunities, or denial of legal standing for victims and their families in proceedings.

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[5] As at 15 July 2018.

[6] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (arts. 2 and 4–7).

[7] Ibid. (arts. 12–14).

(c) Rehabilitation

25. In many States, specialized centres and services for the support and rehabilitation of victims of torture are scarce, difficult to access or non-existent. In spite of their obligations, most States provide no or only inadequate funding for such services. The United Nations Voluntary Fund for Victims of Torture requires annual contributions from States of at least $12 million, but that amount has not been reached once since 2003 (A/72/278, para. 26).[8]

(d) Preventive safeguards

26. The risk of torture and ill-treatment is greatest in the first hours of custody and during incommunicado detention.[9] Therefore, preventive safeguards must be implemented immediately after arrest, including the notification of a third party, access to a lawyer and a physician and the furnishing of the detainee with information on their rights, available remedies and the reasons for arrest. In many States, either such safeguards are not adequately guaranteed under the law or their effective implementation is hindered by delays, physical inaccessibility, a lack of medical staff, public defenders and interpreters, poor infrastructure and means of communication or transport, and the failure to provide for complaints procedures and protection against reprisals.

27. Significantly more needs to be done in many States to properly train and equip law enforcement and investigative personnel in order to ensure the use of non-coercive interviewing techniques (A/71/298) and avoid the excessive use of force in places of detention and in the broader context of law enforcement operations (A/72/178, para. 46).[10]

(e) New equipment and technologies

28. The use of new equipment and technologies can help to prevent torture and ill-treatment and hold its perpetrators accountable, for example by minimizing the use of force, enabling systematic video monitoring of investigative interviewing and replacing confession-based criminal investigations with improved forensic and other scientific processes. The emergence, however, of new types of weapons, equipment and technologies may also raise significant concerns about their possible misuse. States must therefore review and regulate the development, acquisition, trade in and use of new weapons, equipment and technologies in their national law. That includes a duty to determine whether the use of a new type of weapon, equipment or technology would, in some or all circumstances, violate the absolute prohibition of torture and ill-treatment (A/72/178, para. 59). International mechanisms should be encouraged to develop guidance to assist States in that regard. Specific attention should be paid to so-called less lethal weapons, including electric shock devices such as tasers and stun belts, which with growing frequency are used in an excessive manner and in inappropriate contexts, but also to the possible implications of increasingly automated, or even autonomous, technologies, particularly with regard to questions of accountability for harmful or coercive measures taken without meaningful human control.

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[8] See also https://www.ohchr.org/Documents/Issues/Torture/UNVFVT/BrochureUNVFVT.pdf.

[9] Richard Carver and Lisa Handley, eds., *Does Torture Prevention Work?* (Liverpool, United Kingdom, Liverpool University Press, 2016).

[10] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 10).

(f) Exclusionary rule

29. The prohibition of torture and ill-treatment cannot be effectively guaranteed as long as evidence obtained through such abuse is admitted, de jure or de facto, in any national proceedings.[11] Although the exclusionary rule is clear, many States fail to provide for the investigative, forensic and judicial procedures necessary to identify and exclude such evidence. Other States allow for the exclusion only of evidence extracted under torture, although the exclusionary rule also applies to other forms of ill-treatment.[12] Moreover, in some States, evidence may be deemed admissible when obtained by torture or ill-treatment in a third State without the complicity of the first State, although the exclusionary rule applies irrespective of such factors (A/HRC/25/60, paras. 23–30).

(g) Non-refoulement

30. States are under an absolute and non-derogable obligation not to remove, transfer or return any person to another State or territory where there are substantial grounds for believing that they would be in danger of being subjected to torture or ill-treatment.[13] While non-refoulement protection under refugee law is limited to persons entitled to refugee status and allows for exceptions based on considerations of national or public security, no limitation or exception whatsoever is permissible where removal, transfer or return would expose the person in question to a real risk of torture or ill-treatment. However, most national immigration procedures do not sufficiently distinguish between the general, absolute and unconditional prohibition of refoulement in cases where there is a real risk of torture or ill-treatment and the conditional refoulement protection provided under refugee law. A range of practices introduced by States as part of recent migration policies even point towards a deliberate erosion of good faith compliance with this cornerstone principle of international law (A/HRC/37/50, paras. 38–59).

(h) Non-State actors

31. Violence and abuse is increasingly being inflicted by a wide variety of private actors, including not only organized criminals and organized armed groups, but also corporate actors, private contractors or individual citizens acting at the instigation or with the consent or acquiescence of State officials. National legislation is often inadequate in that regard and governments frequently fail to prevent such violence, protect potential victims, particularly in the context of domestic, sexual and gender-based violence, or remove legal barriers to escaping such violence and prosecuting its perpetrators (A/HRC/31/57). Moreover, as the trend towards privatizing functions of the State continues, many States fail to adequately regulate such services or establish jurisdiction over extraterritorial violations committed by contractors and other non-State actors under their instruction and control, or to discharge their due diligence duties with regard to the extraterritorial acts of corporate actors established within their jurisdiction.

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[11] Ibid. (art. 15).

[12] See Committee against Torture, general comment No. 2 (2008) on the implementation of article 2 by States parties (para. 6), and Human Rights Committee, general comment No. 32 (2007) on article 14: the right to equality before the courts and tribunals and to a fair trial (para. 41).

[13] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 3).

2. National institutional framework

32. The effective national implementation of the prohibition of torture and ill-treatment requires a robust institutional framework for the application, oversight and enforcement of the relevant norms and standards.

(a) Criminal justice and complaints mechanisms

33. Effective and independent complaints and investigation mechanisms, including prosecutorial and judicial authorities able to adjudicate violations and prosecute and punish perpetrators, are vital. In practice, non-judicial complaints mechanisms often are the weakest link in the institutional framework. In many States, such mechanisms either do not exist or are insufficiently accessible to potential victims or jeopardized by a lack of structural or functional independence and impartiality. Where such mechanisms enjoy formal independence, they often depend on the same ministry as the service under review, resulting in conflicts of interest that gravely undermine their ability to operate as required. In many States, an alarmingly close relationship can be observed between prosecution services, the judiciary and the police, which severely undermines the separation of powers, judicial independence and the rule of law (A/HRC/13/39/Add.5, paras. 79, 146–151, 174–175 and 255). The resulting pervasive culture of impunity remains a significant challenge to the eradication of torture and ill-treatment throughout the world.

(b) Monitoring mechanisms

34. The regular and independent monitoring of places of detention by specifically mandated human rights bodies and humanitarian organizations is one of the most effective safeguards against torture and ill-treatment. Oversight and transparency are therefore vital and, despite many challenges in practice, an increasing number of States are accepting the idea of regular oversight of places of detention by international bodies such as the Subcommittee on Prevention of Torture and the special procedures of the Human Rights Council, and by national bodies and institutions, including NPMs, national human rights institutions (NHRIs) and civil society organizations. ICRC has an impressive record of regular visits to persons detained for reasons related to armed conflicts, although in non-international armed conflicts access depends on the willingness of all belligerents.

35. The ratification of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by 88 States and the fact that NPMs established thereunder have the power to visit, at any time, any place of deprivation of liberty, including prisons, police stations, health-care settings, immigration detention centres, social-care homes, centres for children or homes for older persons, is a very positive development. To make NPMs truly effective, States must fulfil their obligations under the Optional Protocol and establish mechanisms that are formally and de facto independent from the authorities they monitor, adequately funded and competent to monitor all places of detention regularly and conduct private interviews with any persons deprived of their liberty.

(c) Broader human rights environment

36. Torture and ill-treatment are more likely to persist in a system that lacks a strong institutional human rights framework. Conversely, the presence of robust human rights institutions can help to prevent such abuse. In particular, provided with the necessary independence and funding, NHRIs can play a substantial role in ensuring the harmonization and implementation of national laws and practices relevant to the prohibition of torture and ill-treatment. More generally, a safe environment for civil

society organizations and human rights defenders contributes decisively to protecting human rights and, specifically, preventing torture and ill-treatment.

37. In many States, the broader human rights environment is inadequate or lacking in resources and support. In some cases, it has recently even come under threat through increasingly repressive policies and practices. In many parts of the world, human rights defenders face harassment, persecution and threats to their physical or mental integrity or livelihood by State and non-State actors. That situation is often not only tolerated but instigated or maintained as a matter of official State policy (A/70/217, paras. 35–77).

(d) Political will

38. Perhaps the most important barrier to the effective national implementation of the prohibition of torture and ill-treatment is the absence of the political will needed to shape government policy and change institutional cultures and processes with a view to making the prohibition a reality. Even the most exemplary national framework will remain ineffective if resources and support for it are lacking.

39. A genuine national commitment to eradicating torture and ill-treatment is incompatible with tolerance for corruption, organized crime and similar structural factors that create fertile ground for such abuse (CAT/C/52/2, paras. 72–100, and A/HRC/37/L.32). Indeed, a significant proportion of allegations of torture and ill-treatment received by the Special Rapporteur during country visits relate to abuse inflicted for the purpose of covering up crimes or boosting conviction statistics by coercing innocent persons to confess to offences they did not commit, or for the purpose of punishing or intimidating persons complaining about corruption schemes that lead to cruel, inhuman or degrading living conditions and treatment in places of detention or marginalized communities. Corruption further decisively affects the willingness of authorities to investigate and adjudicate allegations of torture and ill-treatment, or to provide for compensation and rehabilitation. The violent consequences of corruption are exacerbated where State officials collude with organized crime in contexts such as the trafficking or smuggling of persons, human organs, narcotics and other contraband.

40. High-level, official policies may, deliberately or inadvertently, create an environment conducive to the practice of torture and ill-treatment. That certainly is the case where violent political rhetoric directly encourages the use of coercive interrogation against suspected terrorists and other "enemies" of the State. In many States, tough policies on common criminality entail an overuse of incarceration that, in turn, leads to cruel, inhuman or degrading conditions of detention: overcrowded prisons lacking in funding and personnel and with high levels of violence perpetrated by prison staff and between inmates. Similarly, the widespread overuse of solitary confinement may in itself amount to a form of torture or ill-treatment and also increases the risk of additional abuse and the likelihood that violations will go unchallenged.

41. Lastly, an area in which national and transnational policies and practices have had substantial regressive implications for the prohibition of torture and ill-treatment is irregular migration.[14] Widespread deterrence-based, punitive and discriminatory policies undermine the prohibition of refoulement and push increasing numbers of migrants on to irregular routes and into the hands of smugglers and traffickers. Mandatory, prolonged or indefinite criminal or administrative detention, often in

[14] The term "irregular migrants" is used to refer to migrants failing to comply with the regular domestic immigration legislation of their current transit or destination State.

appalling conditions, exposes irregular migrants to substantial risks of torture or ill-treatment (A/HRC/37/50).

42. With regard to State authorities operating on the "front lines", such as law enforcement and security personnel, prison staff and immigration officials, misguided institutional cultures are often conducive to the spread of torture and ill-treatment. In far too many national law enforcement systems, torture and ill-treatment are not effectively discouraged, confessions continue to be favoured and investigative outcomes are rewarded irrespective of the method used to achieve them. Political pressure to deliver results, appraisal systems focused on the number of crimes "solved" or convictions secured, combined with a lack of resources for forensic support and of training in modern criminal investigation techniques, often lead to coercive interrogation being seen as a "shortcut" to delivering the expected results, despite substantial evidence of its ineffective and counterproductive nature (A/71/298, paras. 10–12 and 16–22). Conversely, a practice-oriented, systematic integration of the prohibition of torture and ill-treatment within policing culture not only significantly decreases the risk of excessive use of force and other forms of torture and ill-treatment, but also increases the population's trust and cooperation, making policing more effective and promoting the rule of law.

C. Direct challenges to the prohibition

1. Misinterpretation

43. Certain circumstances may give rise to genuine uncertainty regarding the precise scope of the prohibition of torture and ill-treatment. In case of uncertainty as to the permissibility of a particular act, omission or situation, the prohibition must be interpreted in good faith and in the light of its object and purpose as reflected, inter alia, in international jurisprudence and the standards and guidelines developed for its implementation. If doubt persists, States should always err on the side of caution, given that the act, omission or situation in question can be permissible only once its qualification as torture or ill-treatment has been affirmatively excluded. Particular interpretive caution is required in circumstances involving persons with specific vulnerabilities, which may increase the likelihood of the prohibition being breached.

44. Under legislation in some States, corporal punishment is still provided for and domestic violence and chastisement, in particular against women and children, are tolerated. That must be regarded as incompatible with a contemporary understanding of human dignity and, therefore, cannot be justified as "lawful sanctions" within the meaning of article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.[15] Although the death penalty is not formally prohibited under international law, the wording of article 6 of the International Covenant on Civil and Political Rights and the adoption of its Second Optional Protocol clearly indicate an international commitment to work towards its abolition. It is the considered view of the Special Rapporteur that the circumstances accompanying the practice of the death penalty, including the "death row phenomenon", almost invariably inflict a degree of pain and suffering on convicts and their relatives, which cannot be reconciled with the prohibition of torture and ill-treatment and the underlying principle of human dignity (see A/67/279, paras. 42–51 and 78).

[15] See also Human Rights Committee, general comment No. 20 (1992) on article 7: prohibition of torture or other cruel, inhuman or degrading treatment or punishment (para. 5), and ICRC, *Customary International Humanitarian Law*, vol. I (Cambridge, United Kingdom, Cambridge University Press, 2009), rule 91.

45. Recently, States have even increasingly attempted to reinterpret certain coercive interrogation practices as not violating the prohibition of torture and ill-treatment, predominantly in the context of counter-terrorism and counter-insurgency (see A/71/298, para. 9, and A/59/324, paras. 14–16). Arguments are continually made for narrowing the definition of the prohibited conduct, for example by over-emphasizing the criterion of the "severity" of the pain and suffering inflicted and, in particular, by requiring that serious injury or long-term harm ensue before the action is considered to be in violation of the prohibition. That trend has been accompanied by the emergence of euphemistic terminology, such as "enhanced interrogation" or "pressure techniques", and by the increasing use of methods specifically designed to avoid leaving physical traces, such as stress positions, sleep deprivation, suffocation, hooding or blind-folding, and long-term exposure to physical discomfort, mental pressure and sensory destabilization.

46. In the view of the Special Rapporteur, it is difficult to envisage any realistic scenario of the intentional and purposeful infliction of pain and suffering on a powerless person that would not amount to torture. Without doubt, intentionally inflicting pain or suffering on a powerless person for purposes such as coercion, intimidation, punishment or discrimination always amounts to torture, irrespective of whether the intended pain or suffering is caused by a single method or the accumulation of multiple techniques and circumstances, and regardless of whether the pursued purpose is achieved instantaneously, only after repeated or prolonged exposure, or cannot be achieved at all due to the victim's resilience or other intervening circumstances. Moreover, it must be recalled that any cruel, inhuman or degrading treatment or punishment, regardless of whether it may be formally qualified as torture, is unlawful and cannot be justified under any circumstances.

2. Justification

47. Despite the absolute and non-derogable character of the prohibition, the idea persists that torture or ill-treatment can be justified in exceptional circumstances. Particularly in counter-terrorism, the use of coercive interrogation has been portrayed as a "necessary evil" to ensure public safety and national security, a narrative that has been widely replicated in TV series and other mainstream entertainment and which seems to have strongly influenced an increased public tolerance for torture. Most notably, based on the so-called "ticking bomb" scenario, it is argued that the duty of States to protect the lives of their inhabitants should take precedence over the protection of terrorist suspects against torture when coercive interrogation is perceived as being absolutely necessary to "extract" information required to locate and neutralize a bomb threatening many innocent lives.

48. Exceptionalist narratives such as the "ticking bomb" scenario are fundamentally flawed on several levels. First, from a practical perspective, interrogators can rarely be certain as to whether a suspect really possesses the required information and whether the alleged bomb exists or simply has been invented in order to spread terror, thus entailing a significant risk of error. Second, as a matter of logic, even when suspects possess the required information, they have little reason to tell the truth, as false information can equally interrupt the torture and cause interrogators to lose time verifying the information without being able to neutralize the presumed bomb. Third, from a policy perspective, to permit the use of torture even in the most exceptional circumstances necessarily requires the creation of a system, policy and culture of torture, with interrogators being "trained" accordingly. Experience shows that, once that process has taken place, torture and ill-treatment invariably become a pervasive practice that is impossible to control (see also A/HRC/13/39/Add.5, para. 56). Fourth, from a legal perspective, the "ticking bomb" narrative is based on the misleading rationale that torture should be permitted as a necessary means of last resort, whereby

its infliction must be regarded as proportionate in view of the gravity of the harm to be prevented by saving many lives. However, even if torture did work in such exceptional circumstances, it would still not be permissible under international law. While arguments of necessity, proportionality and lawful purpose may govern the permissibility of interference with qualified human rights, such as freedom of expression and, in extremis, even the right to life, they are legally incapable of justifying violations that are absolutely prohibited, such as torture, slavery and genocide. Fifth, from a global governance perspective, it must be stressed that abhorrent practices such as torture, slavery and genocide have been absolutely prohibited as a matter of universal jus cogens not because they never "work" in practice but because all of them irreparably destroy the humanity and integrity of the victims, the perpetrators and, ultimately, society as a whole. As this mandate stated shortly after the attacks of 11 September 2001, calling into question the prohibition of torture and other ill-treatment in the context of counter-terrorism amounts to "signalling to the terrorists that the values espoused by the international community are hollow and no more valid than the travesties of principle defended by the terrorists" (E/CN.4/2002/76).

49. In view of this fundamental challenge to the prohibition of torture and ill-treatment today, the Special Rapporteur appeals to States to remember that article 5 of the Universal Declaration of Human Rights was a reaction to the abhorrent policies and practices of the Second World War. It is profoundly shocking to contemplate that, as the last generations of survivors of that conflict disappear, so could the incontrovertible lessons drawn from the atrocities they witnessed, thus seriously endangering one of the greatest achievements in human history. In the view of the Special Rapporteur, to question the absolute character of the prohibition of torture and ill-treatment is not a legitimate enquiry of law or policy, but amounts to a short-sighted, self-destructive and irresponsible attack on the very foundations of the post-war new world order based on peace, justice and human dignity. Current world leaders bear the historical responsibility for how they choose to react to this fundamental challenge.

D. Impunity

1. State responsibility

50. In recent years, States have increasingly tended to avoid their international obligations by "delegating" the practice of torture and ill-treatment to other States or non-State actors or by knowingly tolerating or even benefiting from such practices by other States or non-State actors.

(a) Outsourcing

51. Many States increasingly outsource part of their traditional public services to private contractors, including military, intelligence and law enforcement functions. Outsourced activities can include, for example, the protection of specific persons, objects and infrastructure, the policing of assemblies, the transport and interrogation of suspects, and the management of facilities for migrants, of institutions for institutionalized care, and even of prisons and penitentiaries. Particularly where detention facilities are understaffed and under-resourced, there also has been a trend towards the de facto "delegation" of internal prison management to dominant groups of inmates.

52. This development generally has not been accompanied by sufficiently strong national regulation, oversight and accountability structures to control and enforce the compliance of corporate actors and other private contractors with human rights, thus

resulting in widespread impunity for violations (A/HRC/34/54, para. 47, and A/HRC/28/68, para. 52). Under international law, however, States cannot absolve themselves of their responsibility for torture and ill-treatment carried out on their behalf, under their direction or control, at their instigation or with their consent or acquiescence. States are obliged to take effective measures with a view to prohibiting and preventing torture and ill-treatment in all such circumstances and providing redress to the victims.[16]

(b) Extraordinary renditions

53. A particularly deplorable practice that has proliferated in the context of counter-terrorism involves transferring detainees without due process to another country or territory for interrogation under torture and ill-treatment. Many States have facilitated such "extraordinary renditions", including by allowing the use of their airspace and airports, or by hosting "black sites" where torture and ill-treatment occurred (A/HRC/13/42). Although the practice of renditions seems to have subsided significantly in recent years, the transparency, accountability, redress and reparations offered in respect of past practices remain grossly inadequate, with responsible officials being shielded from prosecution and investigations being plagued by a lack of independence, political will and other obstacles, thereby seriously undermining the prohibition of torture and ill-treatment.

(c) Arrival prevention, readmission agreements and diplomatic assurances

54. In the context of migration, States increasingly conclude cooperation agreements with other States or non-State actors aiming to circumvent the prohibition of *refoulement* through the externalization of borders and procedures, or through extraterritorial "pushback" and "pullback" operations. In particular, "pullbacks" are designed to physically prevent migrants from leaving a (retaining) State or territory, or to forcibly return them there, before they can reach the jurisdiction of their destination State. In addition to their direct impact on the rights and safety of migrants, such practices have also facilitated the almost uncontrolled spread of abuse by a wide variety of individuals, including corrupt State officials and organized criminals. It must be reiterated that any participation in, or instigation and support of, such operations may give rise to complicity in, or joint responsibility for, the resulting human rights violations, including torture and ill-treatment (A/HRC/37/50, paras. 8 and 59).

55. Many States also conclude readmission agreements with other States, by which migrants are expelled without an individualized risk assessment to States that have been found to be "safe" on the basis of generalized criteria. This practice is incompatible with the procedural requirements of the prohibition of refoulement and may well amount to collective expulsion (A/HRC/37/50, para. 46).

56. Lastly, there is a widespread State practice of expulsions carried out based on diplomatic assurances by the receiving State that the person in question will not be subjected to torture or ill-treatment. In practice, diplomatic assurances are sought from States that are reasonably believed to practice torture and ill-treatment and the sending State generally lacks genuine interest in discovering subsequent non-compliance by the receiving State. Even in conjunction with post-return monitoring mechanisms, therefore, diplomatic assurances are inherently incapable of providing sufficient protection against such abuse. The practice also expresses a disturbing complacency and acquiescence by the sending State with regard to merely selective

[16] Committee against Torture, general comment No. 2, para. 15.

compliance with the prohibition of torture and ill-treatment by the receiving State (A/HRC/37/50, paras. 47–50).

(d) Intelligence exchanges

57. Intelligence exchanges, particularly in the context of counter-terrorism, continue to undermine the prohibition. In many States, the use of information by intelligence services that may have been obtained by torture or ill-treatment in other countries is still not prohibited or has even been publicly condoned. Such intelligence exchanges have created a "market" for information obtained through torture and ill-treatment (A/HRC/25/60, paras. 37–38) and, in many cases, may well involve complicity in the perpetration of such abuse. Just as is the case for judicial and administrative proceedings, the gathering and exchange of intelligence are conducted to establish the basis for potentially significant decisions by State authorities and, therefore, trigger due diligence obligations with regard to the prevention of torture and ill-treatment (A/HRC/10/3, paras. 55–57). In the view of the Special Rapporteur, any good faith interpretation of the exclusionary rule in line with its object and purpose necessarily must entail its applicability not only to judicial and administrative proceedings, but also to intelligence and executive decisions of any kind (A/HRC/16/52, para. 56).

2. Individual accountability

58. The prohibition of torture and ill-treatment cannot be effectively implemented without individual accountability. Reliable investigation and prosecution mechanisms not only ensure sanctions and redress, but also have a deterrent effect against the occurrence of violations in the first place. In practice, however, the overwhelming majority of perpetrators are never held legally to account and, of those who are, few receive sanctions commensurate with the gravity of their crimes. Widespread failure to hold perpetrators, whether State officials or non-State actors, accountable creates a persistent environment of impunity conducive to torture and ill-treatment. Such shortcomings are often compounded by formal obstacles to individual accountability in national law, such as the application of statutes of limitation, blanket amnesties, immunities and other jurisdictional impediments. The Special Rapporteur is of the view that such obstacles are not compatible with the duty of States to ensure the effective prevention of torture and ill-treatment, the investigation of violations, the punishment of perpetrators and the provision of the required redress, reparation and rehabilitation for victims of such abuse.

3. Non-State actors

59. States often do not sufficiently protect individuals and populations against violence and abuse at the hands of non-State actors, such as organized armed groups, militias and criminal networks, but also corporate actors and private individuals. Where committed for reasons related to an armed conflict, or at the instigation or with the consent or acquiescence of State officials, such violence and abuse generally amount to torture and ill-treatment. Irrespective of the precise circumstances, however, States are legally obliged to take all reasonable measures to protect any individual or group within their jurisdiction exposed to violence and abuse, including gender-based, ethnic or any other discriminatory violence, harmful practices such as female genital mutilation and domestic violence and trafficking in human beings, especially of women and children. This can also entail a duty to retract or revise official policies which, deliberately or inadvertently, create an environment conducive to violence and abuse on the part of non-State actors, such as "tough" policies on irregular migration and petty crime, or complacency regarding domestic, xenophobic or homophobic violence (A/HRC/31/57 and A/HRC/37/50, paras. 30–37).

E. Discrimination

60. In practice, protection against torture and other ill-treatment is not guaranteed equally to everyone without discrimination. In particular, a substantial connection can be observed between social marginalization and other vulnerabilities, on the one hand, and an increased exposure to risks of torture and ill-treatment, on the other.

1. "Suspect" individuals and communities

61. Particularly in the context of counter-terrorism, organized crime and internal armed conflict, but more recently also in the context of irregular migration, there has been a rise in rhetoric, according to which certain persons or groups, owing to the threat they are perceived to represent or the crimes they are suspected of having committed, cannot or should not be granted human rights protections that may pose an obstacle to the protection of public security and "law and order". The identification of such "suspect" individuals or communities often occurs based on nothing more than varying combinations of criteria such as migration status, religion, gender, age, socioeconomic background and ethnic or racial factors, and entails a significant risk of discrimination and abuse, including torture and ill-treatment.

62. It is important to recall that protection from torture and ill-treatment is not a reward for personal conduct or a privilege tied to nationality, status or similar attribute, but is a right that is inherent in every person's humanity and cannot be lost, diminished or lawfully interfered with under any circumstances whatsoever. Discriminatory policies of stigmatization, demonization and prejudice against particular communities or individuals tend to create "black holes" of legal protection and are almost invariably accompanied by increasing tolerance of and widespread impunity for torture and ill-treatment.

2. Marginalization and vulnerability

63. Increased risks of torture or ill-treatment can also arise in other circumstances of vulnerability, usually marked by factors such as power asymmetry, structural inequalities, ethnic divides and socioeconomic and sociocultural marginalization. The growing awareness of those issues has resulted in multiple national and international normative and policy initiatives, including in the framework of the 2030 Agenda for Sustainable Development, but significant efforts remain necessary to remedy the negative consequences of discrimination and marginalization worldwide.

(a) Vulnerability

64. Vulnerability to torture and other ill-treatment arises through a combination of factors, many of which may be inherent in the social, political and legal system. Conceptually, it can be understood as a degree of disempowerment relative to the prevailing environment and circumstances, entailing diminished independence and capacity for self-sustenance, self-protection or self-preservation and, conversely, an increased exposure to risks of injury, abuse or other harm. Vulnerabilities can be influenced, caused, exacerbated or alleviated by combinations of a wide variety of personal or environmental factors, such as age, gender, health, substance dependence, sexual orientation, migration status and socioeconomic, cultural or indigenous background (E/CN.4/1988/17, paras. 55–56; A/63/175, paras. 38–41; and A/HRC/31/57, paras. 9 and 57). Individuals or groups are particularly vulnerable to torture and ill-treatment in environments that are obstructive or oppressive for them and where legal, structural and socioeconomic conditions may create, perpetuate or exacerbate their marginalization. Therefore, States are under a heightened obligation to protect vulnerable persons from abuse and should interpret the torture protection

framework against the background of other human rights norms, such as those developed to eliminate racial discrimination and discrimination and violence against women, and those designed to protect the rights of children and persons with disabilities.[17]

(b) Socioeconomic marginalization

65. Socioeconomic marginalization is an important factor exposing persons to abuse by States and non-State actors. Torture, ill-treatment, arbitrary detention and inhuman or degrading conditions of detention are most likely to be inflicted on persons belonging to the poorest and most disadvantaged sectors of society. Persons living in poverty and those experiencing homelessness or living in illegal settlements often lack access to basic necessities and public services, such as water, food, hygiene and health care, and are legally or de facto disenfranchised. Such marginalization and disempowerment foster the irregular generation of income for life sustenance, often through petty criminality. At the same time, tough penal policies and excessive recourse to incarceration give rise to a vicious cycle of violence and incarceration that expose the most marginalized to an almost inescapable downward spiral of brutalization. Socioeconomically marginalized persons are also most likely to be "scapegoated" by State officials, including by being coerced into confessing to crimes they have not committed, or abused by organized criminals and other non-State actors. Police are often slow to protect the poor against such violence, or may even demand "protection money" in return. To make matters worse, the stigma and marginalization faced by those in poverty often mean that their complaints of ill-treatment are taken less seriously (A/72/502, paras. 9–12, and A/HRC/28/68/Add.3).

(c) Persons deprived of their liberty

66. Places of detention are particularly disempowering environments that combine power asymmetry, stigmatization and discrimination with other forms of vulnerability. Persons deprived of their liberty are often wrongly seen as outcasts not deserving of sympathy, resources or protection, which leaves them exposed to a heightened risk of torture and ill-treatment (A/HRC/13/39/Add.5, paras. 237 and 257). Those risks are greatest during apprehension and the early stages of custody, in incommunicado detention and, more generally, under policies of over-incarceration (A/71/298, paras. 8 and 45). The risks and marginalization associated with detention are further exacerbated in the case of persons with particular vulnerabilities.

(d) Health-care settings

67. Health-care settings are an example of a particular context in which substantial and complex risks of torture and ill-treatment materialize in interaction with other characteristics and structural or situational factors. It has been observed that, with regard to ensuring free and informed consent to health-care treatment, the power imbalance between doctors and patients, exacerbated by stigma and discrimination, results in individuals from certain groups of patients being disproportionately vulnerable to having informed consent compromised. The risk is particularly high in the context of forced institutionalization and treatment of persons with psychosocial disabilities, who are often stripped of their legal capacity and not, or only inadequately, involved in decisions taken with regard to their treatment (A/HRC/22/53).

[17] Committee against Torture, general comment No. 2 (para. 21).

(e) Children

68. Children naturally experience greater vulnerability than adults, owing to their stage of development and limited capacity to escape or react to abuse emanating from their environment. That vulnerability is compounded in legal systems that allow or tolerate domestic violence, sexual abuse, child marriage and child labour and is particularly exacerbated in the case of children who are forcibly institutionalized in prisons, juvenile detention centres, orphanages or medical institutions. That children deprived of their liberty are at a heightened risk of depression, anxiety or other psychological trauma and more prone than others to suicide and self-harm has been well documented. Even short periods in detention can substantially undermine the well-being and cognitive development of children. It is therefore of the utmost importance that children not be deprived of their liberty, except as a measure of last resort and in compliance with the principle of the best interests of the child (A/HRC/28/68).

(f) Women and girls

69. Women and girls often face a heightened exposure to violence and sexual abuse, not only when deprived of their liberty but also in various extra-custodial contexts. That vulnerability is particularly pronounced in legal systems that foster or tolerate the discrimination, oppression and exploitation of women and girls, including through child marriage, forced marriage, marital rape and chastisement, where women's rights to property, divorce or inheritance are restricted, or where they are prevented from obtaining custody of their children or from leaving violent situations (A/HRC/7/3, para. 46, and A/HRC/31/57).

(g) Lesbian, gay, bisexual, transgender and intersex persons

70. Throughout the world, lesbian, gay, bisexual, transgender and intersex (LGBTI) persons face a substantial risk of torture and ill-treatment, including sexual abuse and humiliation. That vulnerability is particularly pronounced in States in which persons are criminalized, stigmatized, persecuted or harassed for their actual or perceived sex, gender identity or expression, sexual orientation or non-adherence to dominant social norms regarding gender and sexuality (A/HRC/31/57, para. 15, and A/HRC/19/41).

(h) Older persons

71. Persons approaching the end of natural life expectancy tend to become more dependent and vulnerable, particularly when deprived of their liberty or accommodated in institutionalized care. The general vulnerability of older persons is often exacerbated by systemic and structural barriers to their enjoyment of human rights, including disability-related discrimination, ageism, neglect and disregard. Only a few States provide complaints mechanisms that are accessible to persons with limited communication abilities, [18] or supported decision-making for persons requiring assistance in exercising their legal capacity (E/2012/51, para. 21). In the view of the Special Rapporteur, therefore, older persons' particular experiences of vulnerability and their consequent exposure to a heightened risk of torture and ill-treatment deserve broader attention.

(i) Persons with disabilities

72. Persons with disabilities face a heightened risk of torture or ill-treatment in a variety of custodial and extra-custodial contexts. Severe abuse, which can take the

[18] Committee against Torture, general comment No. 3 (2012) on the implementation of article 14 by States parties (para. 23).

form of physical and sexual violence or systemic neglect, remains rampant against persons with physical, psychosocial or intellectual disabilities in a wide variety of contexts and is often combined with the denial of accessible channels of complaint or communication. Disability can intersect with other vulnerabilities that exacerbate the risk of abuse and disempowerment, such as migration status, socioeconomic background or childhood (A/55/290, para. 12, and A/HRC/28/68, para. 53).

(j) Irregular migrants

73. Throughout the world, migrants in irregular situations face State policies and practices that directly subject them to torture or ill-treatment or expose them to a heightened risk of such abuse. In addition, irregular migrants often face a wide range of intersecting vulnerabilities, stemming from trauma, personal characteristics, societal factors including racism and xenophobia, as well as from the circumstances in which State policies place them by focusing on deterrence, criminalization and discrimination rather than protection, human rights and non-discrimination (A/HRC/37/50).

3. Non-discrimination as a precondition for the eradication of torture

74. While it is impossible to provide an exhaustive list of groups or persons in situations of vulnerability, the examples outlined above illustrate that any form of discrimination, whether through stigmatization, demonization, marginalization, disregard or otherwise, almost invariably entails a significantly increased risk of torture and related ill-treatment. As this mandate has previously stated, "discrimination... may often contribute to the process of the dehumanization of the victim, which is often a necessary condition for torture and ill-treatment to take place" (A/56/156, para. 19). Indeed, not only is the principle of non-discrimination a general principle in the protection of human rights, but the intentional infliction of severe pain and suffering "for any reason based on discrimination of any kind" also constitutes a distinct form of torture.[19] Resisting dehumanizing ideologies that mark certain persons or groups as inferior or unworthy of human rights protections is an indispensable precondition for the prohibition of torture and ill-treatment but also for the fulfilment of the promises enshrined in the Universal Declaration of Human Rights as a whole.

IV. Conclusions

75. **Since the adoption of the Universal Declaration of Human Rights, unprecedented efforts have been made by States, international organizations, civil society and private citizens to eradicate torture and other ill-treatment throughout the world. In particular, the universal recognition of the absolute, non-derogable and peremptory character of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, and the sophisticated international normative and institutional framework developed to make it a practical reality constitute one of the most significant achievements in human history towards securing respect for the dignity of all human beings without exception or discrimination of any kind and regardless of questions of jurisdiction, territory and nationality.**

76. **Despite this extraordinary achievement, torture and ill-treatment continue to be practised with impunity throughout the world. While the reasons for this sobering reality are many and multilayered, the Special Rapporteur, to the best**

[19] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (art. 1) and Committee against Torture, general comment No. 2 (para. 20).

of his personal judgment and conviction, and informed by broad stakeholder consultations, has identified five areas of primary concern:

(a) Incomplete adoption of the international framework: The international normative and institutional framework for the eradication of torture and ill-treatment still has not been universally ratified. Treaty adherence and acceptance of the individual complaints procedures of the various treaty bodies remain incomplete;

(b) National implementation gap: In many States, a significant gap remains in terms of implementing the international framework at the level of national law and institutions. Shortcomings range from inadequate interpretation of the prohibition of torture and ill-treatment to the absence of preventive safeguards, including effective and independent complaints mechanisms, and from insufficient political will to guarantee the prohibition in practice to inaccessibility and inadequacy of redress and rehabilitation for victims of violations;

(c) Challenges to the prohibition itself: Recently, the prohibition of torture and ill-treatment itself has increasingly come under pressure by States seeking to evade their responsibility for violations and through direct challenges to the substantive scope and the absolute and non-derogable character of the prohibition;

(d) Violent and discriminatory political narratives: Increasingly violent and discriminatory sociopolitical narratives and environments expose "suspect" individuals and communities, irregular migrants, LGBTI persons and other politically, socially, medically or economically marginalized groups to a heightened risk of torture and ill-treatment;

(e) Insufficient protection against non-State actors: In many States, inhabitants enjoy only insufficient protection against violence and abuse inflicted by non-State actors, including organized armed groups, militias, criminal networks, corporate actors and private citizens.

V. Recommendations

77. Recognizing the impossibility of providing detailed guidance on every relevant aspect of the issues raised in this report, the Special Rapporteur herewith reiterates the general recommendations of his mandate[20] and, in the light of the challenges outlined above, particularly emphasizes the following specific recommendations:

(a) Ratification of international instruments: States should ratify, without reservations, all international legal instruments aiming to give effect to the prohibition of torture and ill-treatment, in particular the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol, the International Covenant on Civil and Political Rights and its Optional Protocols, the Rome Statute of the International Criminal Court and other universal and regional instruments, including those intended to protect persons experiencing specific types of vulnerability, such as the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol and the Convention on the Rights of Persons with Disabilities;

[20] E/CN.4/2003/68, para. 26.

(b) National legislation, policies and practices: States should ensure that their national legislation meets, as a minimum, the requirements of international law and that their policies and practices across all national systems, procedures and institutions are unequivocally oriented towards the eradication of torture and ill-treatment. Most notably, the Special Rapporteur calls on all States to expressly criminalize torture and other forms of ill-treatment, to impose sanctions commensurate with the gravity of such offences and to abolish any legislation providing for corporal punishment or tolerating domestic violence and chastisement, and strongly encourages the universal abolition of the death penalty;

(c) National and international institutions: In order to ensure the effective prevention of torture and ill-treatment, the investigation of violations and the provision of redress to victims, States should establish fully independent complaints and investigation mechanisms embedded in an independent, impartial and accessible justice system. Independent national, international and non-governmental monitoring mechanisms, including NPMs and NHRIs, the Subcommittee on Prevention of Torture, the Special Rapporteur, civil society and, in cases of armed conflict, ICRC, should be given full access to all places where persons may be deprived of their liberty or otherwise exposed to a real risk of torture or ill-treatment. More generally, States should ensure that civil society and, in particular, human rights defenders can work in an environment free from threats, discrimination and harassment;

(d) Preventive safeguards: States should ensure that preventive safeguards against torture and ill-treatment are put into place throughout all institutions, mechanisms and procedures. In particular, persons deprived of their liberty should be given the opportunity to inform their relatives, to contact a lawyer and to see a physician immediately after arrest and to access independent complaints mechanisms at any time. Inmates, particularly those experiencing specific vulnerabilities, should be protected at all times against violence and abuse by staff and other inmates. Incommunicado detention should be prohibited and criminalized under national law. Open-ended administrative detention without regular independent review should be abolished, as should detention or forced institutionalization based exclusively on a person's disability, legal capacity, migration status or similarly appropriate criteria;

(e) Training: All personnel that may be engaged in operations involving the use of force should be trained with a view to avoiding any excessive use of force. Prosecutors, investigators and other personnel involved in the questioning of suspects should move away from confessions-based investigation and receive specialized training in forensic, non-coercive interviewing. An international, multi-stakeholder process should produce a universal protocol for this purpose (A/71/298). Personnel tasked with medical examinations, the determination of migration status or the judicial adjudication of alleged abuse should be provided with function-specific training in the identification and documentation of the signs of torture and ill-treatment in accordance with the Istanbul Protocol;

(f) Legal review: In the development, procurement or trading of weapons, restraints and other equipment or technologies likely to inflict pain, suffering or humiliation, States should conduct systematic legal reviews with a view to determining whether their use, in some or all circumstances, would violate the prohibition of torture and ill-treatment or any other obligation under international law, or would significantly increase the risk of such violations occurring;

(g) **Reaffirmation of the prohibition: States should unequivocally reaffirm the absolute and non-derogable character of the prohibition of torture and ill-treatment and condemn violations wherever they occur. States should always interpret and apply the prohibition in good faith, consistently with its spirit, object and purpose, and in line with other relevant legal principles, such as human dignity, non-discrimination and non-refoulement. In doing so, States should seek guidance in internationally recognized soft-law standards relevant to the context at hand;**

(h) **Preventing impunity: Whenever there is reasonable ground to believe that someone has been subjected to torture or ill-treatment, States should conduct a prompt and impartial investigation to ensure full accountability for any such act, including, as appropriate, administrative, civil and criminal accountability, and to ensure that victims receive adequate redress and rehabilitation. States should further ensure that commanders and other superiors are held personally accountable for any culpable failure to prevent torture or ill-treatment committed by their subordinates;**

(i) **Non-discrimination: State leaders should discard violent or discriminatory political narratives, policies and practices based on stigmatization, demonization or marginalization of any kind. Particular efforts should be made to prevent torture and ill-treatment against persons experiencing specific vulnerabilities, such as members of social minorities and indigenous groups, irregular migrants or other non-nationals, persons with physical or mental disabilities, illnesses or substance dependence, LGBTI persons and, more generally, children, women and older persons. These efforts should include measures to remedy legal, structural and socioeconomic conditions that may increase exposure to violence and abuse by State officials and non-State actors;**

(j) **Redress and rehabilitation: States should ensure that victims of torture or ill-treatment are protected and provided with the means for as full a rehabilitation as possible, including through the establishment of specialized centres and adequate funding of the United Nations Voluntary Fund for Victims of Torture and relevant national mechanisms and civil society organizations.**

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Macroeconomic policy questions

International trade and development

Report of the Secretary-General

Summary

The green shoots of the recovery in global trade that began in 2017 have continued in 2018, with trade growth outpacing the growth of global gross domestic product once again. While this would normally lead to an optimistic outlook, the integrity of the multilateral trading system is under threat, and with it, the prospects for sustained global trade growth and the achievement of a comprehensive development agenda. The latest trade statistics are described in the present report, as well as the ways in which a revitalized and resilient multilateral trading system will allow trade to fulfil its role as an enabler for the realization of the 2030 Agenda for Sustainable Development and the Sustainable Development Goals.

* A/73/150.

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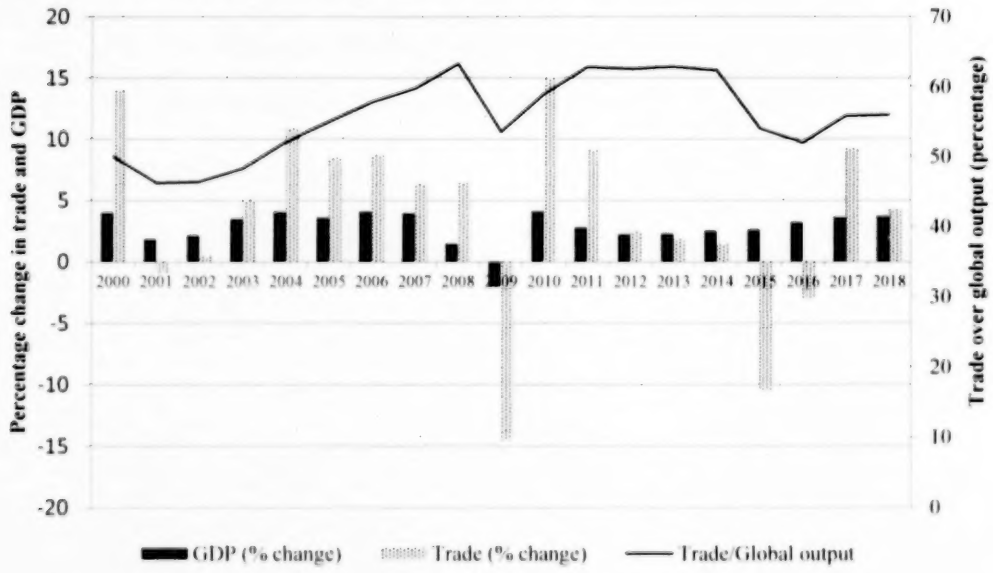
I. Trends in trade

1. In 2017, after two years of decline, global trade finally rebounded. It grew by 9 per cent compared with the previous year, reaching a value close to $23 trillion. Despite the increase, international trade remained about $1.2 trillion below its peak, attained in 2014. According to forecasts from the World Trade Organization (WTO) and the Department of Economic and Social Affairs, trade is expected to grow by about 4.5 per cent in 2018, in line with global output.

2. Notwithstanding the recovery, it is worth noting that there has been a change in international trade dynamics. The steady increase in international trade that characterized most of the 1990s and 2000s has been replaced by a more erratic pattern and generalized fragility. After the strong recovery from the financial crisis of 2008, trade grew at a sluggish pace and then plunged by 12 per cent in 2015 and by 3 per cent in 2016. Two consecutive years of decline in the value of international trade had not been recorded since the early 1980s.

3. The performance of international trade during the past five years has been at odds not only with the previous trend, but also with the overall economic environment. While international trade growth outperformed economic growth during most of the past three decades, in 2015 and 2016 global output increased while the value of international trade decreased.[1] These dynamics are captured by one of the most commonly used indices to gauge globalization trends — the ratio of the value of world trade over global output (see figure I). This index stalled at about 62 per cent between 2011 and 2014 and then fell during 2015 and 2016 — two years that are often referred to as a de-globalization period. The index picked up in 2017, but remains below its peak.

Figure I
Economic and international trade growth: 2000–2018



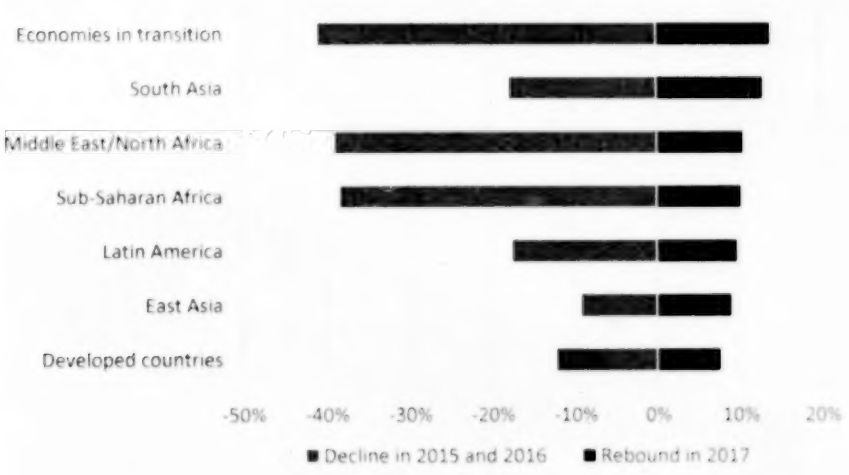
Source: Calculations of the United Nations Conference on Trade and Development (UNCTAD) secretariat are based on data from UNCTADstat.
Note: Data for 2018 are projections.

[1] A decrease in the value of trade during a period of economic expansion has not been recorded since 2001, although the decline in international trade at that time was marginal (not even 1 per cent).

4. The magnitude of the decline in the trade of goods and services observed in 2015 and 2016 reflected not only cyclical factors, such as lower investments and commodity prices, but also a change in the international integration process. Many economies began focusing on a more national development path as a result of the ongoing decline in the vertical specialization process across countries. Indeed, the reliance of the manufacturing sector on imported inputs (measured by the share of intermediate imports over the exports of manufacturing goods) has declined in many countries during the past decade.[2]

5. The trade downturn of 2015 and 2016 was broad-based and geographically widespread. Developing countries were hit hard by the collapse in trade — in most cases, harder than developed countries (see figure II).

Figure II
Export slumps and rebounds
(Percentage)



Source: UNCTAD secretariat, based on data from UNCTADstat.
Note: Growth rates refer to the 2014 baseline.

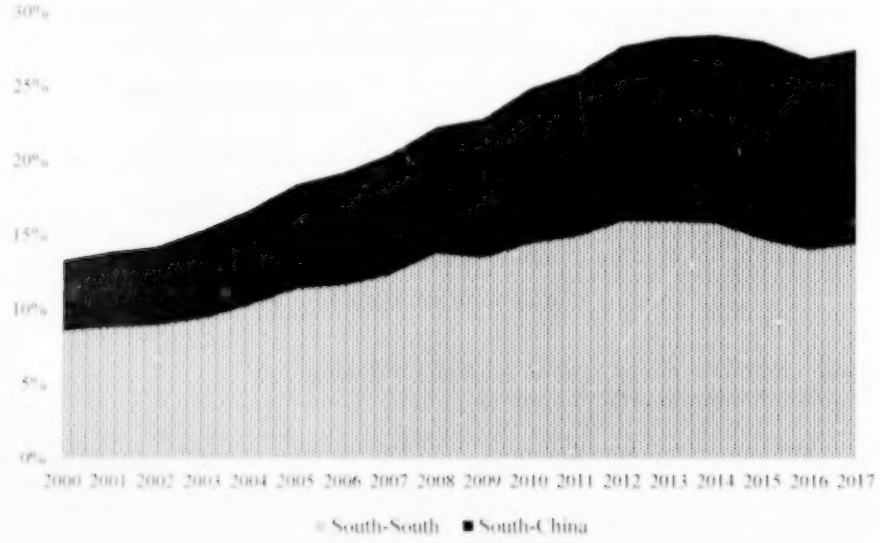
6. Although trade rebounded strongly in 2017, the value of merchandise exports in 2017 remained well below that reached in 2014 for most countries. East Asia represents the only region for which exports returned to levels comparable to those seen in 2014, largely because of more limited declines in 2015 and 2016. This resilience is not surprising, as East Asian manufacturing exporters are in general more diversified and competitive in international markets, which allowed them to better weather the unfavourable economic environment. Looking beyond regional averages, most countries experienced rebounds in 2017 but with different magnitudes. Among the major economies, merchandise exports rebounded by about 9 per cent in the European Union, 8 per cent in China and 6.5 per cent in the United States of America. Emerging Asian economies fared well in general, with exports in the Republic of Korea growing by about 16 per cent and in India by 13 per cent. Wider differences in the magnitude of rebounds are observed in Africa, owing primarily to less diversified export structures. Among major African economies, exports in South Africa grew by about 18.5 per cent, in Nigeria by about 15.5 per cent and in Ethiopia by about 8.5 per

[2] In the case of China, for example, the rate of intermediate inputs over exports fell from almost 50 per cent in 2007 to about 30 per cent in 2017 (UN Comtrade).

cent. On the other hand, exports in Egypt and Kenya grew by only 1 per cent. Exports also rebounded strongly in most Latin American countries. Exports in Brazil grew by 17.5 per cent, in Chile by 12.5 per cent and in Mexico by 9.5 per cent. An exception among the broad-based rebound in Latin American countries was Argentina, whose exports grew by only 1 per cent. The heterogeneity in recoveries across nations highlights the need for the nuanced and varied policy approaches required to achieve Sustainable Development Goal target 17.11, as well as the fragility of gains made in this context.

7. In the past few years, the dynamics of South-South trade have also changed. As of 2017, trade between developing countries accounted for about 27 per cent of global trade. While South-South trade fuelled a large part of the trade expansion during the 2000s (see figure III), its role as engine of global trade growth has diminished during the past five years. Of note is that about half of South-South trade involves China. Excluding trade between China and other developing countries, South-South trade represents about 13 per cent of world trade. South-South trade was more affected by the trade downturn of 2015 and 2016 as well as by the rebound of 2017. This could have important implications for the ability of countries to harness trade to achieve the Sustainable Development Goals.

Figure III
South-South trade (as percentage of global trade)



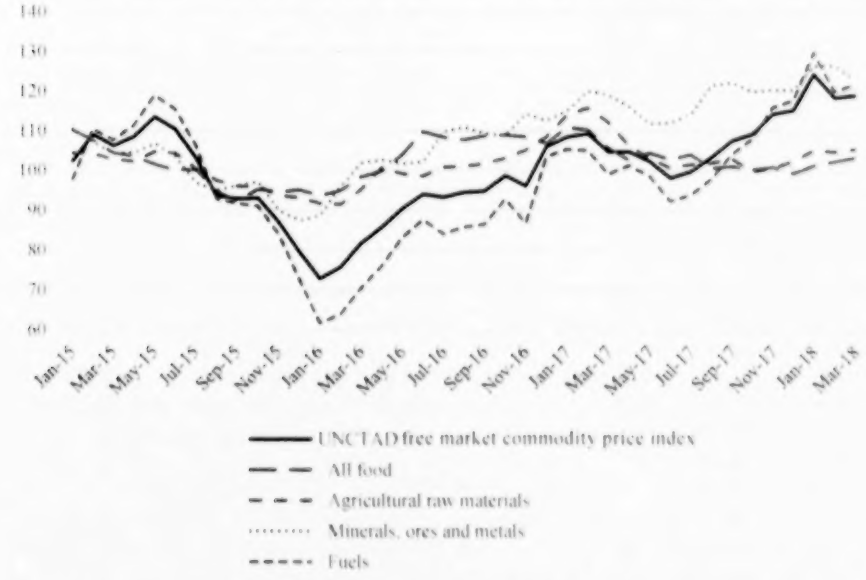
Source: UNCTAD secretariat, based on data from UN Comtrade.

A. Commodities trading is critical for most developing countries

8. Commodity prices have played a substantial role both in the collapse of international trade and in its recovery. Given that almost two thirds of developing countries are commodity-dependent, with the proportion being about 80 per cent among least developed countries, commodities prices remain hugely influential on the export earnings of many countries. Ultimately, price movements affect the ability of developing nations to address their socioeconomic development needs and fulfil the Sustainable Development Goals. In this regard, while commodity prices increased across the board in 2016, the trends in 2017 were more varied (see figure IV). Overall commodity prices kept increasing, as measured by the United Nations Conference on

Trade and Development (UNCTAD) free market commodity price index, which rose by about 8.5 per cent in 2017. However, the increase in this composite index was driven mainly by fuels (up 13.5 per cent in 2017), which reached a two-year high triggered by supply cuts agreed upon by major producers of the Organization of the Petroleum Exporting Countries (OPEC) and non-OPEC producers. The price index of minerals, ores and metals also increased (7 per cent in 2017), fuelled by strong demand and concerns over the limited supply of some base metals, particularly those used in the construction of electric vehicles. On the other hand, general increases in the prices of food and agricultural raw materials that had started in 2016 were reversed in 2017, a year that saw a near-record level of agricultural production. In 2017, the food price index fell by about 7 per cent and the agricultural raw materials price index fell by about 6 per cent. Preliminary statistics for the first three months of 2018 suggest a reversal in the trends of 2017, with a downward trend in the prices of fuels and metals and an upward trend in agri-food prices. However, the most recent projections (not shown in figure IV) show a possible substantial price recovery for metals and fuels. At this stage, it is difficult to determine to what extent this price recovery will be maintained. Current trade rhetoric is expected to affect grains markets, for example, with a possible impact on food supplies and production. Given that most net food-importing countries are developing countries, they are expected to be more affected by policy shocks to international grains markets.

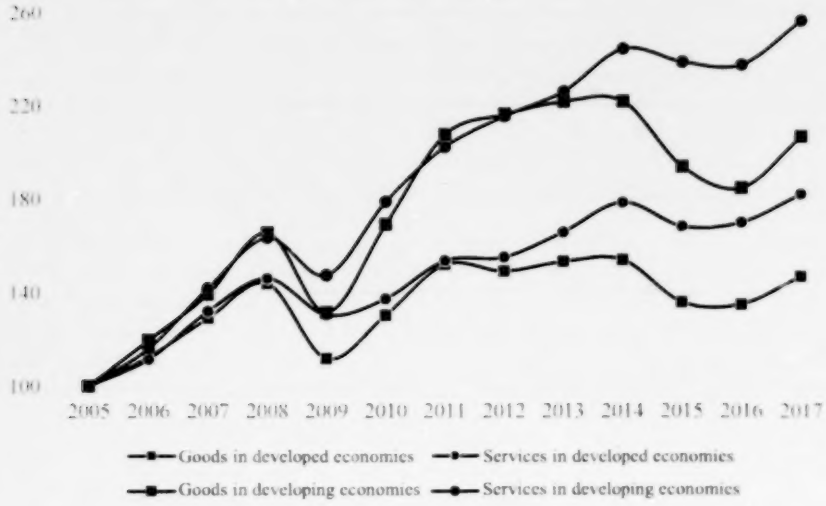
Figure IV
UNCTAD commodity price indices (January 2015 to March 2018) *(2015 = 100)*



Source: UNCTAD secretariat, based on data from UNCTADstat.

B. Trade in services: an area of opportunity for developing countries

Figure V
Exports of services and goods, 2005–2017 (*2005 = 100*)



Source: UNCTAD secretariat, based on data from UNCTADstat.

9. Although trade in services is still dominated by developed countries, developing countries have been catching up. As shown in figure V, over the past decade exports of services have grown more than exports of goods, and have grown more in developing countries than in developed countries. Exports of services have also been more resilient than exports of goods, as shown by the much lower declines in the services exports, both in the 2009 global economic and financial crisis and in the 2015 trade downturn.[3]

10. The developing economies' share in global exports of services increased from 23 per cent in 2005 to 30 per cent in 2017. Among developing regions, Asia registered the fastest growth in exports of services between 2005 and 2017, and Africa the slowest. Despite the focus on transport and travel in the export profiles of developing economies, between 2005 and 2017, telecommunications, computer and information services, financial services and other business services ranked among the fastest-growing categories of services exported from developing economies. These services experienced annual growth rates of 12 per cent, 11 per cent and 9 per cent, respectively. Although for least developed countries, exports of services remain very low relative to global exports of services, about 0.7 per cent in 2017, they are rapidly increasing, accounting for 19 per cent of the total exports from least developed countries. This underscores the potential role of exports of services in achieving Sustainable Development Goal target 17.11.

11. The contribution of services to development can be enhanced by allowing access to international markets, which provide for more competition and relevant inputs and factors that support national services. This idea is supported by the higher

[3] These trends are based on national accounts statistics, which often exclude certain categorizations (such as mode 3 and mode 4 of the WTO modes of supply) and the added value of services incorporated into the exports of goods and of services activities within manufacturing firms. Therefore, such trends underestimate the contribution of services to trade.

productivity of service-exporting firms than of non-service-exporting firms in low-income countries.[4] Still, restrictiveness continues to be relevant in the services trade, especially in professional services and transport. While some countries are reducing restrictions, particularly in mode 3 of the WTO modes of supply, trade in services through the temporary movement of people remains with tight restrictions, such as quotas, labour market tests and durations of stay,[5] restrictive visa and work permit rules and no recognition of qualifications and licences. Considering that trade costs for services are high and declining more slowly than trade costs for goods, addressing such restrictions should be a critical component of trade policy.

12. International trade both in goods and services is increasingly facilitated by e-commerce channels. Although most e-commerce involves business-to-business transactions, the diffusion of information and communications technologies (ICTs) among consumers has increased the importance of business-to-consumer e-commerce transactions. UNCTAD valued the total business-to-consumer e-commerce at nearly $3 trillion.[6] Most of those transactions remain within the national economy. Cross-border business-to-consumer e-commerce is still relatively low. UNCTAD estimates that cross-border business-to-consumer e-commerce was worth about $189 billion in 2015, which corresponded to 7 per cent of total business-to-consumer e-commerce. China, the United States and the European Union are the leaders in cross-border business-to-consumer e-commerce, accounting for about $40 billion each. Cross-border business-to-consumer transactions are expected to grow substantially in the coming years, owing mainly to the further diffusion of ICTs. This is likely to have several implications for both trade and the development agenda, including, but not limited to, the development of infrastructure serving business-to-consumer transactions.

C. An elusive goal: the least developed countries export challenge

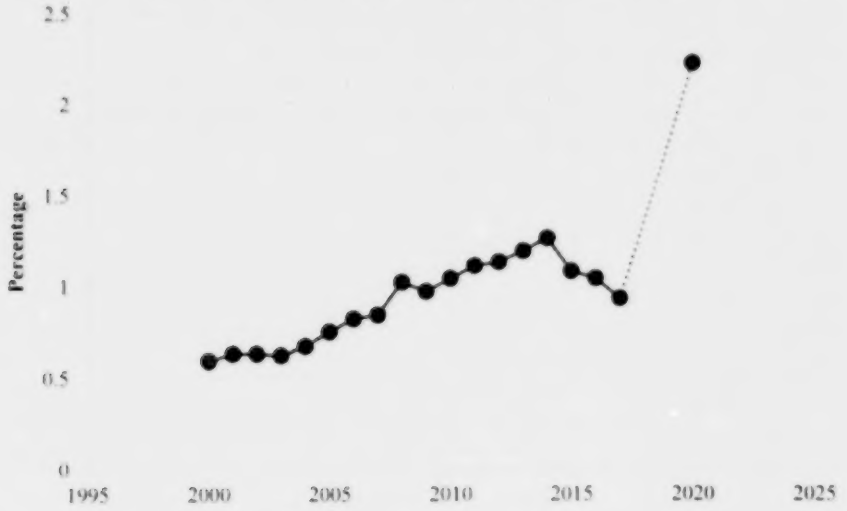
13. As a group, least developed countries moved further away from attaining target 17.11 in 2017. Since 2014, their share in global exports has declined, largely as a result of a drop in exports of natural resources. As of 2017, least developed countries represented 0.93 per cent of global exports. For least developed countries to achieve target 17.11, this share would need to increase by about 33 per cent per year (see figure VI). A coherent policy approach is needed to foster structural transformation and attain sustainable export growth.

[4] UNCTAD, *Services and Structural Transformation for Development* (New York and Geneva, 2017).

[5] International Monetary Fund, the World Bank and WTO, *Making Trade an Engine of Growth for All: The Case for Trade and for Policies to Facilitate Adjustment* (2017).

[6] *Information Economy Report 2017: Digitalization, Trade and Development* (United Nations publication, Sales No. E.17.II.D.8).

Figure VI
Share of least developed countries in global goods export values



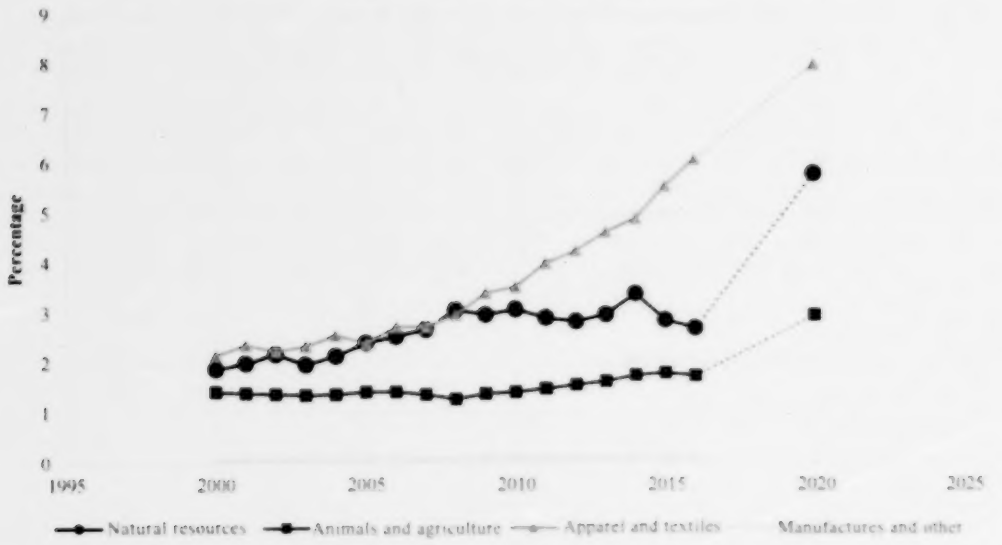
Source: UNCTADstat.

14. While that challenge is significant for least developed countries as a group, there is considerable heterogeneity among them. Seven least developed countries, situated in Africa and Asia, had already achieved target 17.11 as of 2017 or can be expected to achieve it by 2020 given their current export growth. Another 11 countries have achieved significant growth but stayed below the levels required to double their share by 2020. Of the remaining countries, 6 conserved their 2011 share in global exports and 20 had significant negative growth.[7]

15. An important constraint on exports of least developed countries has been the countries' reliance on natural resources. The export value of these goods has declined for all exporters in recent years owing to depressed external demand and falling prices. The exports of commodity-dependent least developed countries have been hit particularly hard by this evolution (see figure VII). Agricultural exports and the least developed countries' share in such exports have grown modestly. Textiles and apparel were key drivers of progress towards target 17.11: least developed countries increased not only the export value of textiles and apparel, but also their share in global exports, and are on good track to double that share by 2020.

[7] Data for three least developed countries (Democratic Republic of the Congo, South Sudan and Timor-Leste) were unavailable at the time of reporting.

Figure VII
Share of least developed countries in goods export values, by sector



Source: UNCTAD.

Note: Four major product sectors were chosen, given their importance for exports in least developed countries: natural resources include primary commodities except agricultural commodities (Standard International Trade Classification revision 3 (SITC 3) codes 27, 28, 3, 68, 667, 971); animals and agriculture include agricultural commodities and animals (SITC 3 codes 0, 1, 21, 22, 24, 26, 29, 4); apparel and textiles include leather goods, textiles, clothing and footwear (SITC 3 codes 61, 65, 83, 84, 85); and manufactures and other include all other goods.

16. Structural transformation and productive capacity are essential to reducing the vulnerability of commodity-dependent exporting least developed countries to external price and demand shocks. However, effective market access also continues to represent a barrier to increasing exports of least developed countries. Sustainable Development Goal target 17.12 calls for duty-free and quota-free market access for all least developed countries and transparent and simple rules of origin. In addition, in its research,[8, 9] UNCTAD has shown that issues such as non-tariff measures, logistics, connectivity and trade facilitation can represent more significant barriers to exports than tariffs. To ensure that least developed countries increase their export share until 2020 and beyond, coherence among different policy areas is needed and should be supported by strengthened global partnerships, which makes the multilateral trading system an essential public good.[10]

[8] Allessandro Nicita and Julia Seiermann, *G20 Policies and Export Performance of Least Developed Countries*, Policy Issues in International Trade and Commodities, Study Series No. 75 (Geneva, UNCTAD, 2016).

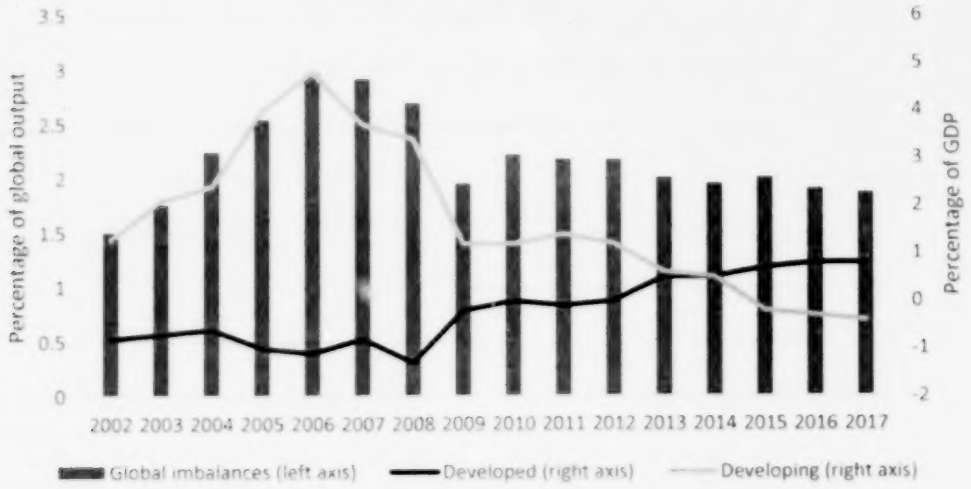
[9] UNCTAD, "Trade facilitation and development: driving trade competitiveness, border agency effectiveness and strengthened governance", Transport and Trade Facilitation Series No. 7 (2016).

[10] Mukhisa Kituyi, "How to ensure the continued participation of least developed countries in the multilateral trading system?", UNCTAD, 3 February 2016. Available at http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1196.

D. Trade imbalances

17. Currently, trade imbalances are an important topic in public debate and on the policymaking agenda. After peaking during the mid-2000s, global trade imbalances have stabilized at about 2 per cent of global output (see figure VIII). Not surprisingly, large economies are the ones contributing most to global imbalances. As of 2017, the current account surplus of Germany was about $300 billion and that of China about $180 billion. On the other hand, the current account deficit of the United States was about $450 billion in 2017. Whether imbalances are sustainable or not depends more on their size in relation to gross domestic product (GDP) than on their absolute value. In that regard, the current account positions of many economies have become closer to more sustainable levels. In particular, the current account surplus of China decreased from more than 8 per cent of its GDP in 2008 to about 2 per cent in 2017.

Figure VIII
Global trade imbalances



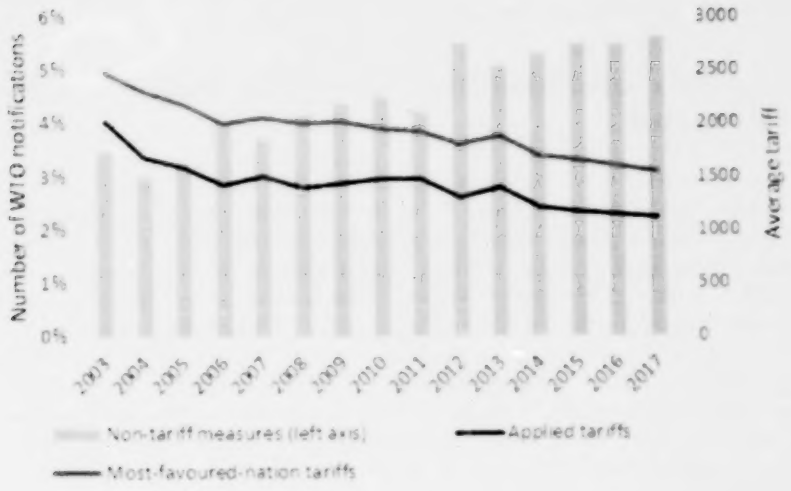
Source: UNCTAD secretariat, based on UNCTADstat and financial statistics from the International Monetary Fund.

Note: Global imbalances are calculated as the sum of the absolute values of current account balances across all countries divided by two.

E. Challenges to market access

18. In relation to trade policy, tariffs have remained stable at low levels during the past few years. However, the ongoing tension between leading trading nations could alter this trend. In 2017, the average most-favoured-nation tariff applied in international trade was about 3 per cent, while the effectively applied rate (considering preferential trade agreements) was about 2 per cent (see figure IX). Beyond averages, tariff protection currently remains a critical factor only in certain sectors and in a limited number of markets. Tariffs tend to be higher in sensitive sectors such as agriculture and apparel, textiles and leather products. Tariffs also remain substantial for most South-South trade (the effectively applied rate is almost 5 per cent), especially regarding South Asian and sub-Saharan African imports. These substantial tariff rates are due principally to the reliance of many countries in those regions on border taxes to finance government budgets.

Figure IX
Trade policy trends



Source: UNCTAD secretariat, based on data from the UNCTAD Trade Analysis and Information System and WTO Integrated Trade Intelligence Portal.

19. Tariffs represent the most obvious impediment to market access; however, despite the current climate, they are hardly ever the most important barrier to trade. Access to markets depends on and is administered by a large and increasing set of regulations and requirements with which traded goods need to comply: non-tariff measures. The number of notifications by WTO member States on various types of non-tariff measures has steadily remained above 2,500 since 2012.

20. In addition to non-tariff measures, many exports must increasingly meet voluntary or private sustainability standards for respecting social, environmental and ethical norms in order to reach the shelves of supermarket chains. Today, over 400 voluntary sustainability standards apply, most of which are set and implemented by non-governmental actors.

21. Meeting such measures and standards has important distortionary effects on international trade, often owing to compliance costs, which may depend on technical know-how, production facilities and infrastructure. These components are lacking in many developing countries and small enterprises, which particularly affects the ability of small producers to enter specialized markets for nature-based, green products.

F. International trade prospects for 2018

22. Most forecasts indicate that global economic growth will continue to be sound in 2018 (about 4 per cent).[11] Trade growth should therefore follow suit, as the historic correlation between trade and economic growth is expected to remain despite a recent uncoupling. Barring any major global economic shocks, cyclical factors — such as trends in consumption expenditures and the commodity cycle — should continue contributing to trade growth in the short term.

[11] See, for example, https://www.imf.org/en/Publications/WEO/Issues/2018/03/20/world-economic-outlook-april-2018.

23. However, the rapid increase in trade policy uncertainty observed recently, at both the national and multilateral levels, may adversely affect international trade and investment, as commitment to a set of rules that provide businesses with a predictable economic environment is essential for international trade.

II. Multilateral cooperation and international trade — a system to be protected

24. The recent waning of political and popular support for trade integration among some nations has affected the outlook for multilateral trade cooperation. Greater trade integration, including greater mobility of people, is increasingly seen by some parties as causing inequalities, social tensions and disintegration. The extent of trade discontent is such that the very existence of the trading system, and the case for multilateral cooperation on trade, are being questioned, which has led to significant course correction, setbacks and the renegotiation of existing and proposed trading arrangements. These have included the ongoing Brexit negotiations, the withdrawal of the United States from the Trans-Pacific Partnership, setbacks in the Transatlantic Trade and Investment Partnership between the United States of America and the European Union, and negotiations on the North American Free Trade Agreement and other free trade agreements, such as that between the Republic of Korea and the United States.

25. A series of unilateral restrictive trade measures announced and implemented by the United States in early 2018 and retaliatory measures announced by affected countries have further jeopardized the prospects for multilateral trade cooperation. At the time of reporting, there was growing concern that these measures could lead to the further imposition of unilateral measures for contestable policy reasons.

26. In its research, UNCTAD indicates that, in the event of further escalation of such tensions, average tariffs on international trade could increase tenfold, from the current level of about 3 per cent to more than 30 per cent. Moreover, policy uncertainty has already had negative repercussions, for example, on investment flows. In its *World Investment Report 2018*, UNCTAD indicates that global foreign direct investment flows fell by 23 per cent in 2017. An escalation and broadening of trade tensions could negatively affect investment in global value chains and thus reduce foreign direct investment, which has been one of the most important and stable sources of financing for developing countries.

27. Multilateral cooperation is the best safeguard against escalating trade tensions. The main concern is that, without the support of the largest economies, the rules-based system of international trade could quickly lose its authority. A shift towards a power-based trading system would not be in the interest of most countries, especially low-income countries.

28. Possible spirals of restrictive and retaliatory trade measures could directly challenge the case for multilateral cooperation and the integrity of the rules-based multilateral trading system. Even if addressed by the Dispute Settlement Mechanism of WTO, the adjudication of such systemically complex and large-scale cases would pose a significant challenge. The Mechanism has been under pressure owing to the blockage of the appointment of new Appellate Body judges (three out of seven seats remain vacant). Paralysis of the Mechanism could significantly affect the credibility and effectiveness of WTO, as the Appellate Body has served as the guarantor of effective enforcement of WTO rules and disciplines. Any waning of the credibility of the multilateral trading system would hurt many developing countries, exposing them to an increasingly uncertain trading environment in which they may not be able to

advance their development agenda, voice their concerns or have the capacity to effectively retaliate against any protective measures of larger trading nations.

29. In addition, an important negative aspect of the current trade frictions is that they are already diverting attention and multilateral efforts away from initiatives in which multilateral cooperation is most needed, such as managing financial integration, addressing corporate taxation and supporting environmental sustainability. Ultimately, global problems cannot be corrected through unilateral actions but require a concerted effort with attention given to achieving progress on meeting the Sustainable Development Goals.

A. Policy outcomes of the eleventh Ministerial Conference of the World Trade Organization and overall negotiations currently on hold at WTO

30. The centrality of the multilateral trading system is increasingly affected by insufficient progress in multilateral trade negotiations under the Doha Development Round. Despite intensive discussions prior to and during the eleventh Ministerial Conference of the World Trade Organization, held in December 2017, the Conference ended without an overarching ministerial declaration. A set of ministerial decisions was adopted on some issues, outlining a progression framework for the post-Conference period.[12]

31. Notably, a commitment was made to continue to engage constructively in the fisheries subsidies negotiations with a view to adopting, by the ministerial conference in 2019, an agreement on comprehensive and effective disciplines.[13] This objective creates a deadline for finding a sound solution to harmful economic incentives that contribute to the depletion of fish stocks and hinder the livelihoods of coastal populations. These efforts are expected to contribute to the achievement of Sustainable Development Goal target 14.6, with its 2020 deadline for eliminating subsidies on illegal, unreported and unregulated fishing and certain forms of fisheries subsidies that contribute to overcapacity and overfishing. Nonetheless, given that this issue was seen as the most promising of all possible deliverables of the Conference, such an outcome was disappointing to many proponents.

32. Against this backdrop of no agreed-upon substantive outcomes, it is significant that initiatives were taken by the proponents of three new issues: (a) electronic commerce; (b) investment facilitation; and (c) enhancing the participation of micro-, small and medium-sized enterprises in international trade. Initiatives were also taken on national regulations relating to services.

33. Those initiatives were hailed by some as representing new ways of doing business at WTO, namely, by allowing willing countries to move forward on specific, contemporary issues. However, others expressed concern that processes might run counter to some core WTO principles — multilateralism and consensus-based decision-making — and that there are no specific mandates on these topics under the Doha Development Round.

34. The Conference participants failed to reach consensus on the general case of the multilateral trading system and the notion of a development agenda underpinning the

[12] These included ministerial decisions on fisheries subsidies (WT/MIN(17)/64), a work programme on electronic commerce (WT/MIN(17)/65), non-violation and situation complaints under the Agreement on Trade-Related Aspects of Intellectual Property Rights (WT/MIN(17)/66) and a work programme on small economies (WT/MIN(17)/63), and the creation of a working party on the accession for South Sudan.

[13] See https://www.wto.org/english/thewto_e/minist_e/mc11_e/documents_e.htm.

current Doha Development Round negotiations. This persistent divide in securing cooperative actions to uphold and strengthen the multilateral trading system has become a source of discontent among developing countries.

35. Ultimately, the Conference may be seen as a missed opportunity to make important progress towards the implementation of Sustainable Development Goal 17, to revitalize the Global Partnership for Sustainable Development, especially target 17.10, to promote a universal, rules-based, open, non-discriminatory and equitable multilateral trading system under WTO.

B. Areas of positive development

36. Without the credible engagement of the world's largest trading nation in multilateral cooperative processes, no negotiations on the Doha Development Round are conceivable. Hence, leadership and participation involving all WTO members remain key to the future direction of the multilateral trading system. Discussions could again be launched on ways to strengthen the multilateral trading system through normative, practical or institutional reforms to its modus operandi. In this regard, it may be recalled that WTO members previously gathered to address issues such as the consensus-based decision-making process; the single undertaking principle; efficiency, inclusiveness and transparency in negotiation processes; the most-favoured-nation principle; special and differential treatment; and the development dimension.

37. In a report,[14] WTO indicates that for the period between mid-October 2016 and mid-October 2017, WTO members applied 108 new trade-restrictive measures, including new or increased tariffs, but also implemented 128 measures aimed at facilitating trade. It is significant that the estimated trade coverage of import-facilitating measures ($169 billion) is more than two times larger than that of import-restricting measures ($79 billion). While such a policy landscape could change if more recent trade restrictive measures were considered, it remains that WTO members continue to abide by WTO disciplines when taking trade policy actions.

38. The heightened uncertainty surrounding the trading system points to the importance of making the case for the multilateral trading system — a system which continues to enjoy legitimacy — as the cornerstone of global trade governance and its contribution to the Sustainable Development Goals. United Nations Member States have repeatedly pronounced their commitment to promoting a universal, rules-based, open, transparent, predictable, inclusive, non-discriminatory and equitable multilateral trading system, consistent with Sustainable Development Goal target 17.10.[15]

39. Multilateral rules and disciplines are the best guarantee against protectionism and are fundamental to the transparency, predictability and stability of international trade. Despite recurrent setbacks and escalating trade tensions, global support for the general case for trade integration with adequate complementary policies and multilateral trade cooperation remains steadfast and widespread.

[14] WTO, *Overview of Developments in the International Trading Environment: Annual Report by the Director-General* (WT/TPR/OV/20), 16 November 2017.

[15] See, for example, General Assembly resolutions 70/187, 71/214 and 72/202, on international trade and development.

Despite the challenges to multilateral cooperation, many countries seek more, not less, cooperation

(a) Regionalism

40. The general case for greater trade integration continues to frame countries' development strategies, as evidenced by the fact that countries standing at the margin of the system continue to seek WTO membership to lock in trade policy reforms and catalyse economic transformation, growth and development. This process contributes to the universality of membership consistent with Sustainable Development Goal target 17.10. Recently, the Comoros and the Sudan have sought to accelerate their accession processes.

41. Furthermore, the continued engagement of many countries in regional trade agreements indicates their desire to capitalize on trade integration. This may enhance countries' readiness for further trade policy reform and for engagement in future multilateral trade cooperation and negotiations. Indeed, many countries have sought to conclude a new generation of regional trade agreements in order to achieve deep integration of a range of behind-the-border measures, in part as a response to a rapid expansion of trade within global value chains.

42. In March 2018, 11 of the original members of the Trans-Pacific Partnership signed the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. Bilateral regional trade agreements have also taken shape, such as between Canada and the European Union and between Japan and the European Union. These agreements are of substantial systemic significance in that they seek to institute high-standard trade disciplines promoting liberalization of trade in goods and services and liberalization and facilitation of investment, and to create a new generation of rules adapted for the twenty-first century in a wide range of areas, such as intellectual property, electronic commerce, State-owned enterprises and the environment.

(b) African Continental Free Trade Area

43. On 21 March 2018 in Kigali, the Agreement establishing the African Continental Free Trade Area was signed by 44 of the 55 States members of the African Union. At a time when the multilateral trading system and the benefits of international trade are being questioned by some, this was a bold step in favour of trade and economic integration for the African continent.

44. The Agreement will ultimately create a wider market of 55 African States comprising more than 1.2 billion people and $2.1 trillion combined national income, consolidating the existing regional economic communities into a single continental block. The Agreement is expected to boost intra-African trade (currently about 18 per cent of its total trade), create economies of scale for investment and regional value chains and foster industrialization processes driven by internal demand. It is expected that 90 per cent of all tariff lines, excluding sensitive and excluded products, will be subject to progressive tariff cuts. In the long run, on the basis of research by UNCTAD, it is estimated that intra-African trade will increase by 33 per cent and that total employment will increase by 1.2 per cent and GDP by 1 to 3 per cent on the continent.

45. However, to fully realize the Agreement's benefits, detailed conditions for market access need to be established without delay, including on national schedules of tariff concessions and on rules of origin. Sensitive and exempted product lists should also be considered in relation to the possible negative repercussions of such

lists on regional integration.[16] States parties to the Agreement also need to mobilize resources to bolster the infrastructure linkages between them, especially in least developed, landlocked developing and small island developing economies, to facilitate the smooth flow of goods across Africa on a more inclusive basis. Finally, cooperation among African countries should be enhanced on rules of origin, customs, trade facilitation, non-tariff barriers,[17] technical barriers to trade, sanitary and phytosanitary measures, transit and trade remedies. The agreement on trade in services, which will progressively lift restrictions on the various means of supplying services, needs to be finalized. The continent's gains will be much higher once the agreement is extended to cover those areas of cooperation.

(c) Fisheries subsidies

46. While in-depth negotiations to clarify and improve rules on fishery subsidies have been conducted for more than a decade and a half,[18] the urgent need for a specific outcome, which emerged from the eleventh Ministerial Conference of WTO, has led the Chair of the Negotiating Group on Rules to redouble efforts through a common and non-attributed draft text and by holding special thematic negotiating sessions throughout 2018 to build a solid base for the establishment of multilateral comprehensive and effective disciplines by 2019, just before the deadline set in Sustainable Development Goal target 14.6. As that target can be considered an "early harvest" of the 2030 Agenda for Sustainable Development, failure to implement it by 2020 is likely to have systemic implications for the entire Agenda.

(d) Digitalization and trade

47. The world is on the cusp of a new digital era, bearing transformational implications for all. In its publication *Information Economy Report 2017: Digitalization, Trade and Development*, UNCTAD shows that the growing digital economy will challenge Governments, businesses and people to adapt. As both enterprises and consumers increasingly go online to buy goods and services, sellers without an online presence will become increasingly invisible in the market. Trade is profoundly affected by digitalization, including through the increased tradability of services, fragmentation of production and trade into tasks, automation, three-dimensional printing and reliance on digital platforms. Currently, most of the $26 trillion in global e-commerce sales take place in developed economies, with 2 per cent of people in least developed countries shopping online. To ensure that current digital divides do not result in widening income inequalities, a concerted global effort is needed to support developing countries with digital transformations.

48. The net outcome of countries taking advantage of digitalization will depend on the readiness to adapt to these transformations. In developing nations especially, most consumers and micro-, small and medium-sized enterprises have yet to leverage the potential that e-commerce has to offer. Moreover, consistency with international commitments such as the 2030 Agenda requires sustained international efforts to ensure that no one is left behind in the digital economy.[19] The multilateral system will play a fundamental role in this process, particularly the multilateral discussions

[16] See David Vanzetti, Ralf Peters and Christian Knebel, "Non-tariff measures: lifting CFTA and ACP trade to the next level", UNCTAD Research Paper No. 14 (February 2018).

[17] Ibid. The gains from tariff reductions could be dwarfed by gains from eliminating non-tariff barriers and increasing regulatory collaboration.

[18] Including the WTO Doha Development Round in 2001 and the WTO Hong Kong Ministerial Declaration in 2005.

[19] An UNCTAD online platform, etradeforall.org, is specifically designed to support developing and least developed countries in finding information and resources to foster e-commerce for sustainable development.

revolving around the balance between having rules that support the potential of e-commerce and having the policy space to address legitimate regulatory objectives, such as data and privacy protection and cybersecurity.

(e) At the multilateral level, some issues move forward

(i) Gender declaration

49. On the margins of the eleventh Ministerial Conference of WTO, 121 members and observers of WTO agreed to support the Joint Declaration on Trade and Women's Economic Empowerment, which is aimed at increasing women's participation in trade by removing barriers and fostering women's economic empowerment. In the Declaration, it is acknowledged that trade policy can contribute to gender equality and women's economic empowerment and it is recognized that, in turn, gender equality and women's economic empowerment are key elements for the achievement of sustainable development.

50. While not a binding legal instrument, the Declaration is a significant step forward at the multilateral level towards mainstreaming gender into trade policy, demonstrating that the trade community has gone beyond treating trade as gender-neutral. It has the potential to bring the trade and human rights communities and legal frameworks closer together. Signatories committed to reporting on progress towards the implementation of the Declaration at the twelfth ministerial conference, in 2019.

(ii) Services

51. The least developed countries services waiver allows WTO members to grant preferences, including preferential market access, to services and service suppliers of least developed countries. However, more than six years after the adoption of the waiver, analysis carried out by UNCTAD revealed that at least half of the preferences — those that are either equal to or less than those offered under the Doha Development Round — do not offer actual preferences or additional market openings for services and service providers of least developed countries. Furthermore, most notified preferences cover market access, with only 15 per cent addressing the extension of national treatments to the services and service suppliers of least developed countries, while many focus on a limited category of services. A small proportion of preferences relate to tourism, construction, health and education services, areas in which many least developed countries have export potential. As a result, the WTO least developed countries group continues to call for enhancing the operationalization of the waiver.

52. WTO members should not stop at the submission of notifications, but should, in addition, uphold the commitments made at various ministerial conferences and the development focus of the General Agreement on Trade in Services. This would require actions to operationalize the services waiver, including measures to address supply capacity issues as confirmed in the Declaration made by ministers of least developed countries at the eleventh Ministerial Conference, in which they stated that the implementation status of all decisions taken in favour of least developed countries had been reviewed, including the services waiver, and called upon members to fully implement the spirit and letter of those decisions. Such a commitment by members must endure after the ministerial conferences are over and must go beyond best-endeavour language.

(iii) Progress in the Agreement on Trade Facilitation

53. Although the negotiations on the Agreement on Trade Facilitation took over a decade to conclude, the inclusive and in-depth preparatory work conducted through the multilateral trading system paid off. For developing countries and least developed

countries, the support provided by international organizations during the negotiations proved significant in providing a robust and outcome-oriented direction for the negotiations. Moreover, the novel provisions contained in the Agreement regarding special and differential treatment for developing and least developed countries were fundamental for concluding the negotiations with a positive outcome.

54. However, the ability of the Agreement to facilitate progress in the simplification of international trade is precarious. For developing and least developed countries, much assistance, in both technical and financial terms, is needed to implement many obligations under the Agreement. Donors, international organizations and the private sector have all come forward with funding and capacity-building and technical assistance programmes. On the basis of WTO notifications on the status and sequence of the implementation of such obligations, progress is being achieved. This momentum of implementation and assistance needs to be maintained in line with the implementation sequences notified by developing and least developed countries, which may be more than 10 years. It is significant that the multilateral negotiations on the Agreement within the framework of WTO have acted as an inspiration for the conclusion of regional and subregional trade facilitation solutions, such as the African Continental Free Trade Area, and for the implementation of such solutions in organizations such as the East African Community.

55. The sustained and consolidated efforts by the United Nations [20] and other development partners have been one of the cornerstones of the adoption of the Agreement and will assuredly lead to the further simplification of international trade procedures, thereby contributing to the socioeconomic development of countries and the achievement of the Sustainable Development Goals.

III. What multilateral cooperation initiatives should focus on to achieve the specific Sustainable Development Goals

56. The 2030 Agenda underscored the role of trade as a powerful enabler of transformative shifts towards the achievement of sustainable development.

57. International trade is defined as a means of implementing the Sustainable Development Goals (as set forth in Goal 17), and meaningful progress in the Doha Development Round is considered essential for revitalizing the Global Partnership for Sustainable Development, as described in target 17.10. Revitalizing the Partnership could also have an impact on progress made in achieving other substantive goals linked with a successful conclusion to the Doha Development Round, including: Sustainable Development Goal target 17.12, to realize timely implementation of duty-free and quota-free market access for least developed countries, including by ensuring that rules of origin are transparent and simple; target 2.b, to correct distortions in world agricultural markets, including through the parallel elimination of export subsidies; target 3.b, to provide access to essential medicines; target 8.a, to increase Aid for Trade support; target 10.a, to implement the principle of special and differential treatment; and target 14.6, to prohibit, by 2020, certain forms of fisheries subsidies which contribute to overfishing.

[20] UNCTAD actively supported developing and least developed countries throughout the negotiation phase of the Agreement and is engaged in providing support for its implementation. Through its Automated System for Customs Data programme, UNCTAD continues to implement automated solutions for customs clearance in more than 90 countries. Through the e-registration tool, UNCTAD assists countries in meeting their transparency obligations under the Agreement by developing national and regional trade information portals.

58. Under the right conditions, trade provides for access to foreign products, services and markets, enables economies of scale and generates employment. Trade enables better use of productive resources and may catalyse structural transformation with higher technological capabilities and economic sophistication, which could trigger longer-term economic development. Harnessing the benefits of trade for development that are economically, socially and environmentally inclusive and sustainable points to the need for policies to set the right conditions. Without policies for sharing prosperity, trade may increase inequalities, heighten social tensions and lead to environmental degradation.

59. Global collective action through multilateral trade cooperation is essential for tackling cross-border challenges to development. Revitalizing a global partnership is critical for the implementation of the Sustainable Development Goals, and the multilateral trading system continues to be the cornerstone of such a partnership and should be regarded as a global public good.

A. Agriculture (Sustainable Development Goal 2)

60. The national support pillar remains fundamental for the multilateral trading system. Without reforms, agricultural markets remain distorted, largely seen as unfair to developing countries. Major economies have shifted most of their support to non-trade-distorting "green box" measures, which account for the bulk of national support (for example, for dairy, poultry, cereals, cotton and soybeans). While this type of support is intended to be non- or minimally trade-distorting, concerns exist that the overall quantity of support may distort trade.

61. Most developing countries have no commitments to reduce trade-distorting support, called "amber box" support, and are entitled only to de minimis support and support as defined under article 6.2 of the Agreement on Agriculture (for small-scale or resource-poor farmers). Giving greater scrutiny to, and possibly placing a cap on, the amount of overall trade-distorting support are among the key outstanding issues to be addressed through WTO negotiations.

62. National support remains the key issue for cotton as well. The four proponents[21] of the cotton initiative, the Cotton Road Map, seek to achieve ambitious, expeditious and specific cuts in national support, including through the elimination of cotton-specific aggregate measures of support, deeper cuts on de minimis entitlements and greater transparency on "green box" measures.

B. Gender equality (Sustainable Development Goal 5)

63. Trade is fundamental in providing employment opportunities for women. Many developing countries have relied on export-led growth strategies, which have created many jobs from which women have benefited, especially in labour-intensive manufacturing sectors. The services sector is increasingly providing employment opportunities for women, and in many developing and least developed countries women's employment is shifting from agriculture to services.

64. Tensions in trade relationships, unilateral actions taken outside the WTO framework and the perception that trade tensions are escalating may shrink markets and have an impact on job creation. This affects not only the quantity of jobs that trade creates, but also their quality. Gender inequality in wages and work conditions is used as a competitiveness strategy — particularly within global value chains. In a

[21] Benin, Burkina Faso, Chad and Mali.

recent report,[22] UNCTAD demonstrated that both regional and overall world market integration had led to an increase in women's employment in the traditional blue-collar category but not in the white-collar tasks with higher levels of responsibilities and higher salaries.

65. Gender-sensitive implementation of all Sustainable Development Goals is necessary to fully achieve sustainable and inclusive economic development. Gender-responsive trade policies are premised on sound statistics. However, trade and business statistics have not been designed to capture gender issues, and statistics on intra-household decision-making are rare. Women are frequently employed in difficult-to-measure activities, such as informal work, unpaid work and household care activities. Hence, there is a need for multilateral cooperation initiatives aimed at: improving the availability of sex-disaggregated data; assessing the data necessary for gender-responsive trade policymaking; discussing how to improve data infrastructure to facilitate data linking (for example, linking statistics on enterprises with product data and household data); and developing new approaches for collecting data necessary to inform gender-responsive trade policy.

66. In addition, there is a need for broader use of gender impact assessments of trade policies before, during and after their implementation. For example, an ex ante gender impact assessment of a trade agreement under negotiation makes it possible to predict the agreement's likely impact on women and, accordingly, adjust its terms and/or introduce compensatory measures if the likely impact is negative or complementary measures to increase the expected positive impacts.[23] Multilateral cooperation initiatives need to work towards supporting the further development of such gender assessment tools and their broad usage.

C. Reduced inequality (Sustainable Development Goal 10)

67. In a report,[24] UNCTAD showed that trade liberalization does not necessarily lower unemployment if the labour market adjusts only sluggishly at the sectoral level. Accordingly, for any international cooperative policy strategy to be successful, labour market outcomes should be treated as a major concern not only at the national level, but also at the international level. For example, trade negotiations should be directed not only by trade interests and relative competitiveness, but also by employment and wage considerations. Furthermore, concessions and adjustment support should be considered not only in terms of market access conditions, but also in terms of their effects on employment and wages. In the same spirit, Aid for Trade programmes should be assessed not only according to their potential effects on trade, but also for their potential effects on net job creation and the subsequent changes in relative earnings. These considerations would go far in enhancing the contribution of trade to the fulfilment of Sustainable Development Goal 10.

D. Fishery subsidies (Sustainable Development Goal 14)

68. The lack of delivery on a multilateral solution to fish subsidies will maintain the existence of harmful incentives to harvest already depleted fish stocks. Political will in addressing more complex negotiating gaps and active and constructive engagement by all Members will be key in delivering on Sustainable Development Goal

[22] UNCTAD, *East African Community Regional Integration: Trade and Gender Implications* (2018).

[23] In that regard, UNCTAD has developed the trade and gender toolbox to conduct ex ante gender impact assessments of trade reforms.

[24] UNCTAD, *Market Access, Trade and Sustainable Development: The Labour Market Channel*, Developing Countries in International Trade (Geneva, 2018) (forthcoming).

target 14.6. Other multilateral and regional trade approaches can and should contribute to more sustainable fisheries as well. Aligning strategies that take into account the stated objectives of the Sustainable Development Goals — with a view to promoting policy coherence — should support this process. UNCTAD, the Food and Agriculture Organization of the United Nations and the United Nations Environment Programme will continue to support countries as required towards building consensus on fisheries subsidies by 2019.

E. Development issues

69. Special and differential treatment remains a long-standing and central issue for the development dimension of the multilateral trading system. While there is no easy solution, developing countries are seeking to prioritize those provisions that could facilitate policies aimed at industrialization, such as local content requirements under the Agreement on Trade-Related Investment Measures and the provisions of the Agreement on Subsidies and Countervailing Measures. On the other hand, the effective implementation of past decisions on special and differential treatment remains a key concern; for example, the full implementation of article 66.2 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, which provides incentives for firms to transfer technology to least developed countries, has yet to be secured.

70. In this context, it is important to ensure effective operationalization of the least developed countries services waiver through the provision of commercially meaningful preferential treatment of services and services suppliers of least developed countries. Building the services capacity of least developed countries and facilitating the recognition of qualifications are also important. While 24 notifications have been made to date regarding preferential treatment for least developed countries under the services waiver, no least developed countries have resorted to such measures.

71. Increasingly, countries are seeking to capitalize on the services economy and trade to induce structural transformation in order to attain sustainable development. This is even more the case as the achievement of many goals and targets under the Sustainable Development Goals requires universal access to basic, essential services, including health, education, financial, water, environmental, energy, transport and telecommunications and ICT services.

IV. Conclusions

72. Trade is an important source of prosperity, ideas and values for sustainable development. However, it is widely recognized that the benefits of trade integration have not been evenly distributed across countries and within societies and have often been concentrated among a few actors, while any adverse effect on inclusiveness and the social and environmental dimensions have essentially been seen as externalities. These uneven outcomes may lie at the root of the recent scepticism on the benefits of globalization and trade and the resurgence of nationalist and isolationist sentiments and policies.

73. As the world seeks to harness globalization in realizing the social, economic and environmental goals embodied in the Sustainable Development Goals, it is imperative that trade play its full part, which means both sustaining growth and ensuring consistency with sustainable development. Without policies for sharing prosperity, including through trade and labour adjustment mechanisms, trade may increase inequalities, heighten social tensions and lead to environmental degradation.

Proactive and coherent policy mixes, bringing together trade, development and industrial, macroeconomic, social and other policy areas, need to be mainstreamed into national policy agendas. In that process, it is important to recognize that trade is changing shape in response to technological advances, expanded value chains, new business models and policy innovation.

74. International markets need to be open, but also need to be managed to ensure that trade promotes sustainable development. A global partnership is an essential means of implementing the Sustainable Development Goals, and a universal, rules-based, open, non-discriminatory and equitable multilateral trading system will be a central component of such a partnership, as provided under Sustainable Development Goal target 17.10. In a context of rising trade tensions, setbacks in multilateral trade negotiations and burgeoning regional and plurilateral processes, revitalizing the multilateral trading system as a global public good with renewed momentum and relevance is fundamental. This can start with the integration of sustainable development dimensions into trade policy, negotiations and agreements.

75. The United Nations system will remain a major stakeholder in the multilateral trading system in view of the global development imperative of revitalizing the Global Partnership for Sustainable Development. It should continue to provide unambiguous support for multilateral trade cooperation and its development dimension to realize a global enabling environment for sustainable development. It represents the best guarantee against protectionism and economic nationalism, and could best underpin the transparency, predictability and stability of international trade. Such a system has worked particularly for the benefit of weaker and more vulnerable economies dependent on trade to trigger economic transformation and development. The United Nations system could usefully support Members' efforts in charting the way forward to overcome trade scepticism and strengthen trade multilateralism in support of sustainable development.